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# Case and Comment

*The Lawyers Magazine*

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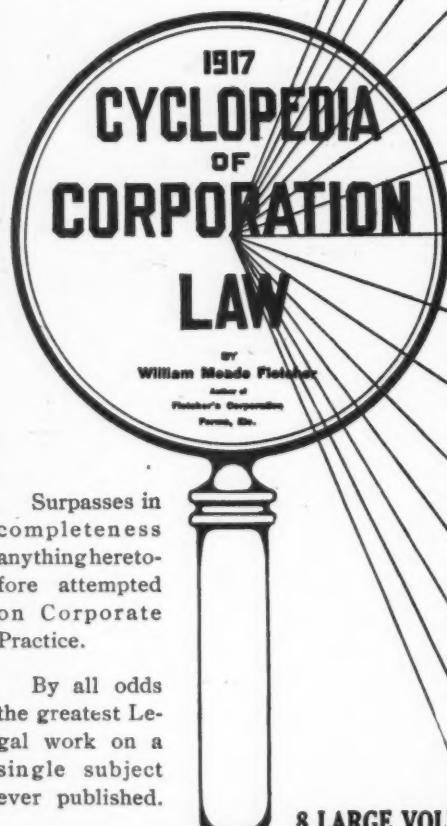
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## *Individual Liberty and the Common Good*

From the foundation of civil society, two desires, in a measure conflicting with one another, have been at work striving for supremacy: First, the desire of the individual to control and regulate his own activities in such a way as to promote what he conceives to be his own good; and second, the desire of society to curtail the activities of the individual in such a way as to promote what it conceives to be the common good. The operation of the first of these we call liberty, and that of the second we call authority. Throughout all history, mankind has oscillated, like some huge pendulum, between these two, sometimes swinging too far in one direction and sometimes, in the rebound, too far in the opposite direction. Liberty has degenerated into anarchy and authority has ended in despotism, and this has been repeated so often that some students of history have reached the pessimistic conclusion that the whole process was but the aimless pursuit of the unattainable. I do not, myself, share that view. In all probability we shall never succeed in getting rid of all the bad things which afflict the social organism—and perhaps it would not be a desirable result if we should succeed, since out of the dead level of settled perfection there could not come that uplifting sense of moral regeneration which follows the successful fight against evil, and which is responsible for so much of human advancement—but I am sure that in most ways, including some of the ways of government, we are better off to-day than we have ever been before. It is, however, apparently one of the corollaries of progressive development that we get rid of old evils only to acquire new ones. We move out of the wilderness into the city and thereby escape the tooth and claw of savage nature, which we see clearly, only to incur the sometimes deadlier menace of the microbes of civilization, of whose existence we learn only after suffering the mischief they do. To-day, as always, eternal vigilance is the price of liberty—liberty whose form has changed but whose spirit is the same.

Fifty years ago a great French writer—Laboulaye, I think it was—speaking through the lips of one of his American characters, uttered these words of wisdom and of power, words which are as true to-day as they were when they were written:

"The more democratic a people is, the more it is necessary that the individual be strong and his property sacred. We are a Nation of sovereigns, and everything that weakens the individual tends toward demagogic; that is, toward disorder and ruin; whereas everything that fortifies the individual tends towards democracy; that is, the reign of reason and the Evangel. A free country is a country where each citizen is absolute master of his conscience, his person, and his goods. If the day ever comes when individual rights are swallowed up by those of the general interest, that day will see the end of Washington's handiwork; we will be a mob and we will have a master."

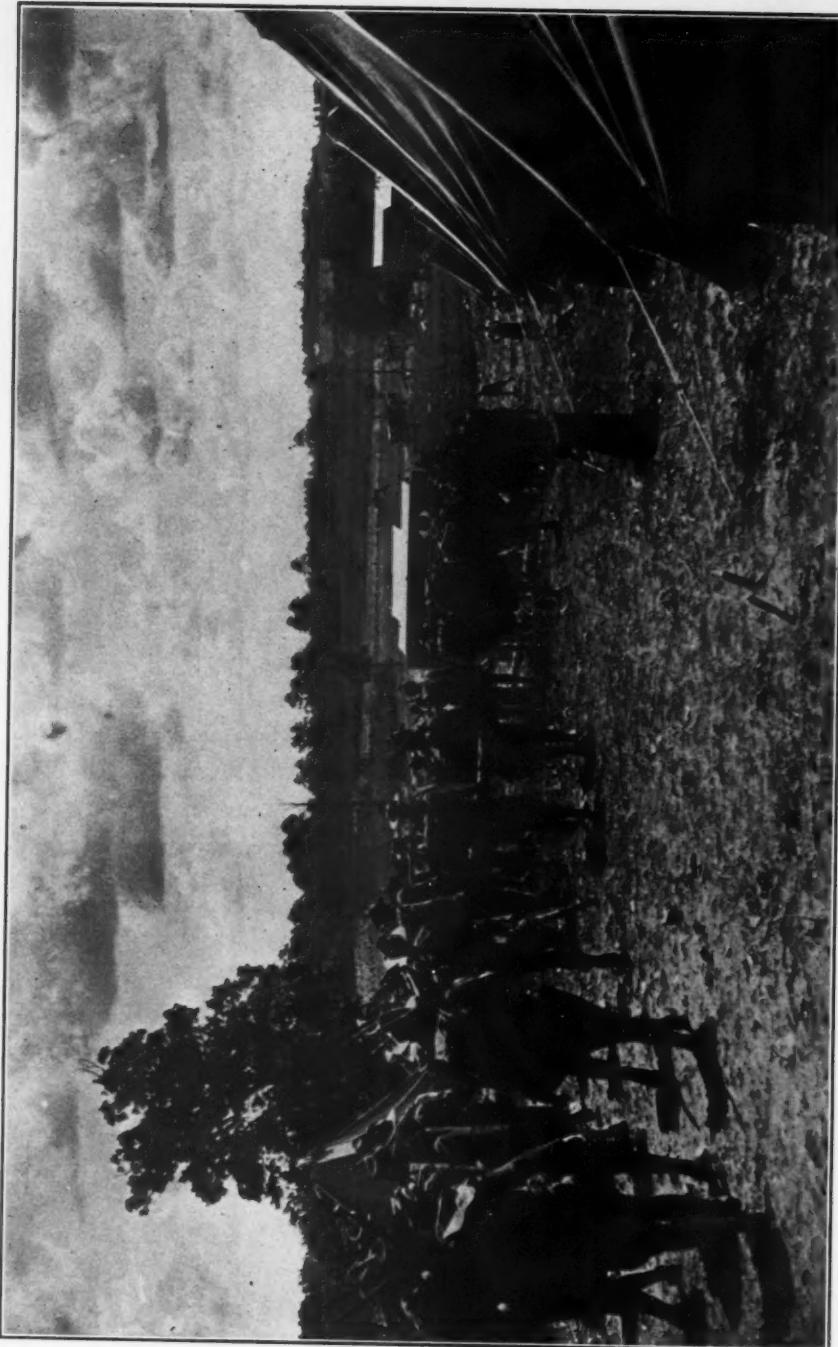
It is now as it has always been, that when the visionary or the demagogue advocates a new law or policy or scheme of government which tends to curtail the liberties of the individual he loudly insists that he is acting for the general interest and thereby surrounds his propaganda with such a halo of sanctity that opposition or even candid criticism is looked upon as sacrilege.

But the time has come when every true lover of his country must refuse to be misled or overawed by specious claims of this character. Individual liberty and the common good are not incompatible, but are entirely consistent with one another. Both are desirable and both may be had.—Hon. George Sutherland in Address before American Bar Association, September 4, 1917.

*Passed by the Committee on Public Information*

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# Case and Comment

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## Appropriation of Private Property for Public Use in War Times

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### Introductory.



SEVERAL recent statutes passed either since the declaration of war with Germany, or in anticipation thereof, make provision for the seizure of private property by the government for purposes connected with the prosecution of the war. Both personal and real property are included in these provisions. The use is to be in some cases temporary, while in others the property is permanently appropriated.

By this legislation the government in the interest of a vigorous and effective prosecution of the existing war asserts a control over private property to a greater extent than ever before known in our history. The limits of a paper of this kind prevent our quoting the full text of all this legislation. We shall only summarize the provisions of these statutes and then consider some of the legal and constitutional aspects of this novel situation. It will be found that the decisions of the courts on some analogous questions which have occurred in the past throw much light on the question as to what view will be taken in the future, both as to the constitutional validity of these provisions and their proper administration.

### Shipping and War Materials.

The existence of a state of war with the Imperial German Government was declared by Joint Resolution of Congress and a proclamation of the President, both dated April 6, 1917. For a long time previously relations had been in a state of extreme tension.

Legislation looking to a state of war was taken in the National Defense Act of June 3, 1916, § 120 (39 Stat. at L. 213, chap. 134), by which "The President in time of war or when war is imminent is empowered" to purchase or procure military supplies, and in case of failure or refusal to furnish them, to take charge of and operate the plants producing them.

The naval appropriation act of March 4, 1917 (39 Stat. at L. 1192, 1193), extended this authority to include not only war materials but ships.

Finally, by the Army and Navy deficiency act of June 15, 1917,

"The President is hereby authorized and empowered within the limits of the amounts herein authorized—

"(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

"(b) To modify, suspend, cancel or requisition any existing or future contract for the building, production, or purchase of ships or materials.

"(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

"(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

"(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

Authority over ships and shipping plants is thus made of a most complete and thorough character. Compliance with all orders issued under the terms of the act is mandatory on any person to whom such order is given. Such order shall take precedence over all other orders and contracts placed with any person. Refusal or failure of compliance is to result in the President taking immediate possession of any ship, charter, material or plant of such person, or of any part thereof without taking possession of the entire plant as may be thought best.

The President, July 11, 1917, made an executive order which, after reciting the act to which I have referred, is as follows:—

"I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession by purchase or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it

through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose."

The United States Shipping Board here referred to was created by the Act of September 7, 1916 (39 Stat. at L. 728, chap. 451). The United States Shipping Board Emergency Fleet Corporation, capitalized at \$50,000,000, was incorporated under § 11 of that act (39 Stat. at L. 731). All of the stock, except qualifying shares of trustees, is owned by the Shipping Board.

It is further provided by the Act of June 15, 1917:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by § 24, ¶ 20, and § 145 of the Judicial Code."

In what courts and in what manner these provisions of the Judicial Code authorize suits to be brought against the United States will be stated later on in this article.

#### Interned Vessels.

At the time of the original declaration of war between Germany and other countries of Europe, August 1, 1914, there were a large number of German vessels in the ports of the United States. From that time until the declaration of war with Germany by our own country, April 6, 1917, no obstruction was placed by our government in the way of any of these vessels freely departing from our ports whenever they should desire to do so.

This was a barren right, however. The navies of Great Britain and her allies were from the beginning of the war in open possession of the seas, subject only to the operations of submarines and a few other sporadic commerce destroyers.

These vessels therefore remained moored to their piers in our ports in idleness, until upon our declaration of war, they were seized by our government.

The seizure was legalized by Joint Resolution of May 12, 1917, by which the President was authorized to take over the immediate possession and title of any vessel which at the time of coming into the jurisdiction of the United States was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken.

This resolution further authorizes the President through the United States Shipping Board, or any department or agency of the government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

The Secretary of the Navy is authorized and directed to appoint a board of survey to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of the taking, and to make a written report of their findings to the Secretary of the Navy, such findings to be competent evidence in all proceedings on any claim for compensation.

To consider in detail, what, if any, rights remain in the German owners of these vessels would be premature at the present time. The right of the United States government to seize any vessel belonging to a citizen of an enemy country for military or naval use is recognized by decisions of the Supreme Court. Where

such a vessel was lying in a Cuban port during the Spanish War, the Supreme Court affirmed the right of the government to seize and use it as an act of war, even though it was captured after the capitulation of the port and after active hostilities had come to an end. The ves-

sel in that case was ultimately returned to the owners, and the claim was based only upon temporary detention. *Herrera v. United States*, 222 U. S. 558, 56 L. ed. 316, 32 Sup. Ct. Rep. 179. The court held:

"There is a distinction between a seizure of private property of an enemy for immediate use of the army and the taking of such property as booty of war."

This distinction may be important in questions hereafter arising with reference to these vessels.

There is, however, another and much more meritorious class of claimants whose rights will undoubtedly receive the serious consideration of our courts.

These vessels, during the long period of tying up at our wharves, while their government was in a state of war with other nations of Europe, while the United States remained neutral, necessarily incurred heavy expenses for supplies and repairs, and perhaps for money to pay their crews. Such supplies and cash may have been, and probably were in many cases, advanced by citizens of the United States on the credit of the vessels.

The general rule as to the rights of persons furnishing such supplies and materials on the credit of a ship or of a ship and owners in a foreign port has been thus stated by the Supreme Court of the



GEORGE A. KING

United States (*The Grapeshot*, 9 Wall. 129, 136, 137, 19 L. ed. 651, 654, 655):

"Upon proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts."

This resolution as first reported by the Senate Committee on the Judiciary contained a provision authorizing any person or corporation to institute a suit in the Court of Claims for the recovery of damages sustained through the exercise of the power therein authorized. Such damages were to be limited to just compensation for the interest or right of which the claimant was deprived by reason of such taking. In order to recover a judgment, the claimant must prove that he was at the time of taking the owner of the interest or right for which he seeks compensation. All enemy citizens were to be excluded from making any claim, thus limiting its benefits to our own citizens, or citizens of our allied countries or neutrals (*Congressional Record* of April 30, 1917, p. 1512).

The resolution, however, ultimately became a law without this provision. For what reason it is not easy to say, as much of the debate took place behind closed doors (pp. 1514, 1515).

What is the status of a claim of a lien on one of these vessels by an innocent American or other neutral citizen who advanced supplies, materials, or labor in kind, or money for supplies, repairs, or wages on the security of the vessel?

The resolution on its face leaves this question unanswered. The only clause left in the resolution as it became a law which seems to bear on this subject appears at the end. It directs the appointment of a board of survey, which is required to appraise the vessel and all property contained thereon and to make a written report of its findings to the Sec-

retary of the Navy. "These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

Under the recognized rule of statutory construction (*United States v. Fisher*, 109 U. S. 143, 145, 27 L. ed. 885, 886), "that, if possible, effect must be given to every clause, section, and word of the statute," this provision clearly contemplates that *some* claim for compensation is to be recognized.

During the Civil War, Congress, March 3, 1863 (12 Stat. at L. 762, chap. 90, Comp. Stat. 1916, § 10,164), passed an act providing—

"That in all cases now or hereafter pending wherein any ship, vessel, or other property, shall be condemned in any proceeding by virtue of the acts above mentioned, or of any other laws on that subject, the court rendering judgment of condemnation shall, notwithstanding such condemnation, and before awarding such ship, vessel, or other property, or the proceeds thereof, to the United States, or to any informer, first provide for the payment, out of the proceeds of such ship, vessel, or other property, of any bona fide claims, which shall be filed by any loyal citizen of the United States, or of any foreign state or power at peace and amity with the United States, intervening in such proceeding, and which shall be duly established by evidence as a valid claim against such ship, vessel, or other property, under the laws of the United States or of any loyal state thereof: *Provided*, That no such claim shall be allowed in any case where the claimant shall have knowingly participated in the illegal use of such ship, vessel, or other property: *And provided also*: That this act shall extend to such claims only as might have been enforced specifically against such ship, vessel, or other property, in any loyal state wherein such claim arose."

Notwithstanding the existence of this statute the Supreme Court refused to recognize a claim of lien upon the capture of a vessel as prize (*The Hampton*, 5 Wall. 372, 18 L. ed. 659, affirming 6 D. C. 75). The court below refused to enforce this act on the ground that it was "perfectly incomprehensible and therefore incapable of being carried into execution."

The Supreme Court came to the same conclusion by different reasoning on the ground that the statute did not apply to prizes captured on the high seas.

The former ground is one which should never be taken by any court in

reference to any statutory enactment. It failed to receive the approval of the Supreme Court in this very case.

The ground taken by the Supreme Court would not apply to the present case, as these vessels have not been captured on the high seas or condemned as prize of war.

The act of 1863 is re-enacted in the Revised Statutes as § 5322, with a clause restricting it to condemnation "by virtue of any laws relating to insurrection or rebellion,"—a restriction not contained in the original statute.

A more recent expression of public policy is contained in the shipping act of September 7, 1916, § 12 of which (39 Stat. at L. 732, chap. 451) provides that the United States Shipping Board "shall investigate the legal status of mortgage loans on vessel property, with a view to means of improving the security of such loans," etc.

The Supreme Court has said (*United States v. Matthews*, 173 U. S. 381, 386, 43 L. ed. 738, 739, 17 Sup. Ct. Rep. 413): "Looking at the question of public policy by the light of the legislation of Congress, on other subjects, it becomes clear," etc.

Perhaps the acts of 1863 and 1916 may be regarded as an expression of a public policy on the part of Congress in favor of recognizing *bona fide* liens upon confiscated vessels.

If "any claim for compensation" is to be recognized, as is implied in the terms of the joint resolution validating the seizure of these vessels, the Court of Claims has jurisdiction of it. Its organic act, as we shall see, provides that it shall hear and determine "all claims founded upon any law of Congress." The Supreme Court has held that it is not necessary that a law creating or recognizing a claim shall make any reference to the Court of Claims or to a remedy therein; that when any law creates or recognizes a claim, the organic act of the Court of Claims gives that court jurisdiction to hear and determine it as a claim "founded upon any law of Congress."

It said (*Medbury v. United States*, 173 U. S. 494, 495, 43 L. ed. 781, 19 Sup. Ct. Rep. 503):

"As the claim in this case is founded upon the law of Congress of 1880, it would seem that under this grant of jurisdiction the Court of Claims had power to hear and determine the claim in question."

So, should it be decided that the joint resolution of 1917 gives rise to "any claim for compensation," the Court of Claims has jurisdiction to hear and determine such claims.

#### Other German-Owned Property.

The Trading-with-the-Enemy Act, approved October 6, 1917, § 6, provides for the appointment "of an official known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy," etc.

It also provides (§ 7, ¶ c):

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Acting under this statute the President by executive order of October 12, 1917, empowered the alien property custodian "to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to or belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the Trading-with-the-Enemy Act, which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held."

Provision is made for the payment to the alien-property custodian of any indebtedness owing to an alien enemy or for the delivery to him of any property belonging to such enemy, even though such payment or delivery may not be mandatory under the terms of the act.

The policy of the government in thus seizing property which, in the hands of an alien enemy, might be used in prose-

cuting war against the United States bears some analogy to the legislation of the Civil War for the capture and sale of cotton and other property in the Southern States. Such property was by act of March 12, 1863 (12 Stat. at L. 820, chap. 120), to be sold and the proceeds put into the Treasury; all loyal owners to have the right within two years after the suppression of the Rebellion to make claim for the proceeds in the Court of Claims. Under this statute not only were the proceeds in the Treasury returned to owners who were in fact loyal; but under the policy of universal amnesty mercifully adopted at the close of hostilities, all owners, loyal and disloyal alike, were allowed to recover the proceeds through the Court of Claims.

Chief Justice Chase said, in announcing the decision of the Supreme Court, to this effect in the great constitutional case of *United States v. Klein*, 13 Wall. 128, 137, 20 L. ed. 519, 522:

"The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied."

The property to be seized under the legislation to which we are referring is captured not as booty of war, but to prevent it from being used for purposes of hostility against the United States.

To what extent it will be the policy of the government to restore such property or its proceeds to its German owners is a question as to which we are in too early a stage of the war to venture an opinion.

The impossibility of settling the public policy of the government at this early stage is recognized by § 12 of the act:

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

Where, however, the seizure of any such property shall have an injurious effect on rights of either citizens of the United States or of any allied or neutral nation, it can hardly be doubted that under the terms of the statutes defining the jurisdiction of the Court of Claims that

court has the power to restore to an innocent citizen his money or proceeds of his property which has found its way into the Treasury.

The Supreme Court sustained an action in the Court of Claims for the recovery by a citizen of his money which had by mistake found its way into the Treasury of the United States. It said (*United States v. State Nat. Bank*, 96 U. S. 30, 35, 36, 24 L. ed. 647, 648):

"An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial."

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved."

The opinion of the Court of Claims which was approved by the Supreme Court by its affirmance of the judgment said, 10 Ct. Cl. 519, 545:

"In order to support this action there need be no privity of contract between the parties, except that which results from one man's having another's money, which he has not a right conscientiously to retain. The subject of the action must either originally have been money or that which the parties treated as money."

Thus should property be seized as German when it is in fact American, allied, or neutral, the law gives the true owner a mode of reclaiming his property or its proceeds.

#### Factories, Pipelines, Mines, Plants, etc.

The act "To provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, contains a number of far-reaching provisions authorizing seizure of private property for various purposes connected with the prosecution of the existing war.

By § 12. "Whenever the President shall find it necessary to secure an adequate supply of necessities for the support of the Army or the maintenance of the Navy, or for any other public use connected with the common de-

fense, he is authorized to requisition and take over, for use or operation, by the government any factory, packing house, oil pipe line, mine, or other plant, or any part thereof, in or through which any necessities are or may be manufactured, produced, prepared, or mined, and to operate the same."

When it is determined that the government needs the factory, packing house, oil pipe line, mine, or other plant no longer it is to be restored to the person entitled to possession.

This provision seems to contemplate only a temporary occupation and use of the property by the government. It is required to be restored to the person entitled to possession when no longer essential for the national defense.

The section further provides that "The United States shall make just compensation, to be determined by the President, for the taking over, use, occupation and operation by the government of any such factory, mine or plant, or part thereof." If the compensation is unsatisfactory to the person entitled to it, he shall be paid 75 per cent of the amount so determined and be entitled to sue the United States to recover such further sum as will amount to a just compensation therefor, as provided in the law as to shipping and war materials. How this value is to be ascertained and in what court the right must be asserted will be shown later on.

#### Distilled Spirits.

By § 15 of the food control act it is made unlawful to use any foods, fruits, food materials, or feeds in the production of distilled spirits for beverage purposes.

By § 16 the President is authorized and directed to commandeer any or all distilled spirits in bond or in stock at the date of the passage of the act for redistillation, in so far as such redistillation may be necessary to meet the requirements of the government in the manufacture of munitions and other military and hospital supplies.

The same provision for fixing the compensation, and if it is unsatisfactory, allowing the owner to accept 75 per cent and sue for the balance justly due, is made here as in respect to shipping and war materials. How the value is to be ascertained and in what court suit is to

be brought will be seen in a later part of this paper.

#### Coal Mines and Coal.

By § 25 of the food control act the President is authorized whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of, and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign. If any producer or dealer fails or neglects to conform to such prices or regulations, or to conduct his business efficiently under the regulations and control of the President, or conducts it in a manner prejudicial to the public interest, the President is authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate it in such manner as he may direct during the period of the war. Any producer or dealer whose plant, business, and appurtenances are taken over is to receive a just compensation. If the price so fixed, or if in case of taking over of the mines or business, the compensation determined is not satisfactory, the person entitled to receive the same is to receive 75 per cent of the amount and have the right to sue the United States for the balance as in the case of shipping and war materials.

As an alternative, the President may require any or all producers of coal or coke to sell their products only to the United States. The United States is then to resell the same to the public. Within 15 days after notice that the output is to be purchased by the United States, shipment is to be made only upon authority of the agency designated by the President. Thereafter no producer shall sell any of his products except to the United States through such agency, and that agency alone is to purchase the output of such producers.

The prices to be paid are to be based upon a fair and just profit over and above the cost of production. Here again just

compensation is secured to the producers of coal and coke by the provision that the price shall be fixed by the Federal Trade Commission, and if it is not satisfactory the producer may take 75 per cent and sue for the rest.

This provision seems broad enough to cover not merely the taking of the coal for the use of the United States but sales by the producer or dealer to private parties. A literal construction of the act would seem to require that, even where the sale is to a private party, if the price fixed by the government is not satisfactory, 75 per cent may be taken and the government is made liable for so much as added to the 75 per cent thus received will make up a "just compensation."

The language of the provision authorizing the taking over of the plant of the producers of coal and coke is worthy of notice. It is:

"The President is hereby authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealers as a going concern," etc.

What a going concern is and how its value may differ from the mere physical elements of the property is clearly stated in a recent decision of the Supreme Court, *Omaha v. Omaha Water Co.* 218 U. S. 180, 202, 54 L. ed. 991, 1000, 48 L.R.A.(N.S.) 1084, 30 Sup. Ct. Rep. 615, where the court sustained an allowance of over half a million dollars to the Water Company for what was termed the "going value" of the plant. The court said:

"It did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes, or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value," etc.

Thus when the plant and business of a coal mine owner are seized they are taken "as a going concern," and are to be paid for accordingly.

#### Condemnation of Land.

An act approved July 2, 1917, entitled,

"An Act to Authorize Condemnation Proceedings of Land for Military Purposes," authorizes the Secretary of War to cause proceedings to be instituted "for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction of, or prosecution of works for fortifications, coast defenses, and military training camps," etc.

A contract may be made with the owner of the land or donations of land may be made and accepted.

When such property is acquired in time of war or the imminence thereof, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes immediately on filing of the petition for condemnation.

The object of this statute is explained in a letter of the War Department accompanying the committee report of the bill, House Report No. 85, 65th Congress, 1st Session, p. 2. It is to permit the government in time of the existing emergency to take possession of the land at once upon the filing of a petition for condemnation, without awaiting the result of the action of the court, a provision obviously necessary at a time like this.

It also suspends the provisions of existing law, Revised Statutes, § 355, which requires that property cannot be acquired by the government until the legislature of the state has given its consent to the acquirement of the property and until the Attorney General of the United States has certified to the validity of the title.

When the nation is at war, when enormous bodies of men are being brought together for training in order that they may more promptly and effectively defend the homes of the nation, it would never do to stay the hands of the government from taking possession of such land as may be needed for military purposes until condemnation proceedings could be carried on through the courts with the deliberation which should necessarily characterize all judicial inquiries. As was said in the letter of the War Department to which we have referred:

"While these restrictions are proper ones in time of peace, when the public interests will not materially suffer by delay, it will be apparent that their enforcement in time of war or the imminence of war may result in delays which would be very harmful, if not vital, to the interests of the government."

This act permits the government to take possession of the property immediately upon presenting its petition to the court. The court is then to make inquiry and fix the value, which it is to be presumed will be done with all practicable despatch in order to prevent the owner from suffering loss by being deprived at the same time both of his land and of the money which is to compensate him for either its temporary occupation or its permanent taking.

The act contemplates proceedings in the United States District Court for the value. The valuation placed upon land by a U. S. District Court will doubtless be promptly paid under appropriation made by Congress. If it is not paid the owner will have a right to sue for it in the Court of Claims. He will have that right even without any formal judgment of condemnation. If the government seizes land and fails to pay for it or for an interest which it takes, the owner is entitled to proceed in the Court of Claims to recover the value of the land or of the interest taken.

The Supreme Court has said (*United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 657, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306), where water rights were taken to supply the National Capital with water:

"We are of opinion that the United States, having by its agents, proceeding under the authority of any act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

Thus where land is taken over either for temporary or permanent use a full remedy is secured to the owner to recover the value of the interest taken;—primarily by condemnation proceedings in the United States District Court, and ultimately, whether formal proceedings are taken condemning the land, or the land is taken without any formal condemnation, by proceedings in the Court of Claims to recover either the full value of the fee simple or compensation for temporary use.

Other provisions of a still more summary character for the taking of land are made by the urgent deficiency act, approved October 6, 1917, by which land is to be obtained for ordnance proving grounds and if "it cannot be procured by purchase then the President is hereby authorized and empowered to take over for the United States the immediate possession and title," etc.

Provision is made in the same language as in other acts to which I have referred for making "just compensation" either by executive authority or by payment of 75 per cent of the amount and suit against the United States to recover the balance.

It is also provided that "upon the taking over of said property by the President as aforesaid the title to all property so taken over shall immediately vest in the United States."

Provision is made in similar language for "the immediate taking over for the United States of the possession of and title to land, its appurtenances and improvements," for the construction of torpedo boat destroyers, their hulls, machinery and appurtenances, with similar directions as to making compensation either by executive authority or in case of disagreement by suit in the Court of Claims, or in a limited class of cases in the United States District Courts.

It is also specifically provided by Joint Resolution of October 6, 1917, that the Ordnance Department of the Army in purchasing land for war uses is to be relieved of the requirements of United States Revised Statutes, § 355, requiring an opinion of the Attorney-General in favor of the validity of the title and the consent of the legislature to the purchase.

**General Supplies for the Army and Navy.**

Section 10 of the food control act contains a general provision:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor."

This is a general provision to cover all supplies needed by the Army and Navy. It vests in the President by express language a power which has been exercised generally without legislative authority in previous wars. It is certainly far preferable that a power of this kind should be exercised by express authority of Congress with systematic provisions for fix-

ing the compensation rather than by irregular seizures of property without any systematic method of making compensation as has been the case in previous wars, notably in the Civil War.

This clause contains a general provision that if the compensation determined is not satisfactory to the owner he shall be paid 75 per cent of the amount and shall be entitled to sue the United States to recover the balance of the value. Differing, however, from all the other provisions as to the court by which the compensation is to be awarded, it adds: "Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

(The conclusion of this article, which will appear in the January Case and Comment, discusses *Property Seized Without Express Legislative Authority, Inventions Used by the Government, Constitutional Questions, Courts in Which Suit Is to Be Brought, etc.*)



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GENERAL VIEW OF BARRACKS AT CAMP UPTON

# The Supreme Court of Nebraska

BY DALE P. STOUGH

*of the Lincoln (Neb.) Bar*



Rose, and Sedgwick, assembled in joint convention with the legislature, and officially observed the fiftieth anniversary of the admission of Nebraska to statehood.

Beginning with a great historical parade, reviewed by President Wilson, at Omaha, in September, 1916, and continuing with suitable exercises in each county of the state, the semicentennial program continued until June, 1917, closing with a comprehensive historical pageant at Lincoln and an address by Colonel Roosevelt.

But the judicial history of Nebraska reaches back to the territorial days. On May 30, 1854, President Pierce signed the Nebraska-Kansas bill, which concluded the ten-year struggle led by Senator Stephen A. Douglas of Illinois to form the territory of Nebraska. Shortly thereafter the first territorial court was formed. The first chief justice, Fenner Ferguson of Albion, Michigan, reached Nebraska on October 11, 1854, and his associates James Bradley and Edward R. Harden came within the next few weeks. In the thirteen years of its existence the Nebraska territorial court had four chief justices, Fenner Ferguson, Augustus Hall, William Pitt Kellogg, and William Kellogg. Besides Justices Bradley and Harden, heretofore mentioned, there were six other associate justices: Justices Joseph Miller, William F. Lockwood,

Joseph E. Streeter, Samuel W. Black, who resigned in 1859 to become territorial governor of Nebraska; Elmer S. Dundy, who later became United States district judge for Nebraska; and Honorable Eleazer Wakeley, the "Nestor of the Nebraska Bar," who was still practising law in Omaha at ninety years of age, when he died in 1912.

The first state Constitution, adopted in 1866, provided for a supreme court to consist of a chief justice and two associate justices, elected for six-year terms. They were required to hold one term of court annually at the seat of government, and the state was divided into three judicial districts. In addition to the duty of hearing cases on appeal, rendering decisions, and preparing opinions in the supreme court, each justice acted as trial judge in the district court, which was the court of general law and equity jurisdiction. During the nine years this system prevailed the state had only the Union Pacific main line and a few other short lines of railroad, touching but a few counties out of the territory now comprising ninety-three counties. It is recorded that some of the judges were required to travel 10,000 miles in a year going to and from their trial courts, most of which had to be done by stagecoach, by buckboard, or on horseback.

In 1875, when the present Constitution of the state was adopted, it was provided that "the judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns." It was also provided that the supreme court should consist of three members, and the judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, should serve as

chief justice. By this system of rotation, which continued until 1908, the first fourteen justices of the Nebraska supreme court served from one to four times as chief justice of the state.

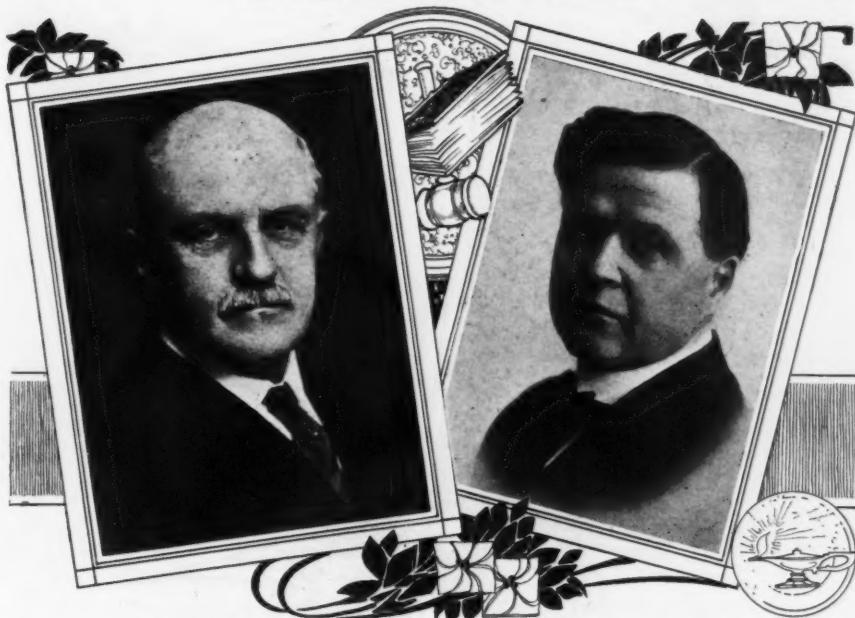
In the fifty years of its existence, the Nebraska state supreme court has had but twenty-three members. Seven of these are serving at the present time. Eight ex-justices of the court are still



HON. ANDREW M. MORRISSEY  
Chief Justice

In 1908, the court was increased by constitutional amendment to seven members, consisting of a chief justice and six associate justices. Provision was also made for the separate election of a chief justice. The court now stands at the head of a judicial system which has grown until there are eighteen judicial districts with thirty-two trial judges, and the state has a network of county (probate), municipal, and justice courts.

living, and all actively practising law in Nebraska (except one now serving on board of control of state institutions), three in Lincoln, two in Omaha, and one each in Seward, Columbus, and Grand Island. The eight deceased justices were all residents of Nebraska at the time of their death, and, as yet, no judge has permanently removed to some other state after his term of service as a member of Nebraska's supreme court.



HON. CHARLES B. LETTON

Associate Justice

HON. WILLIAM B. ROSE

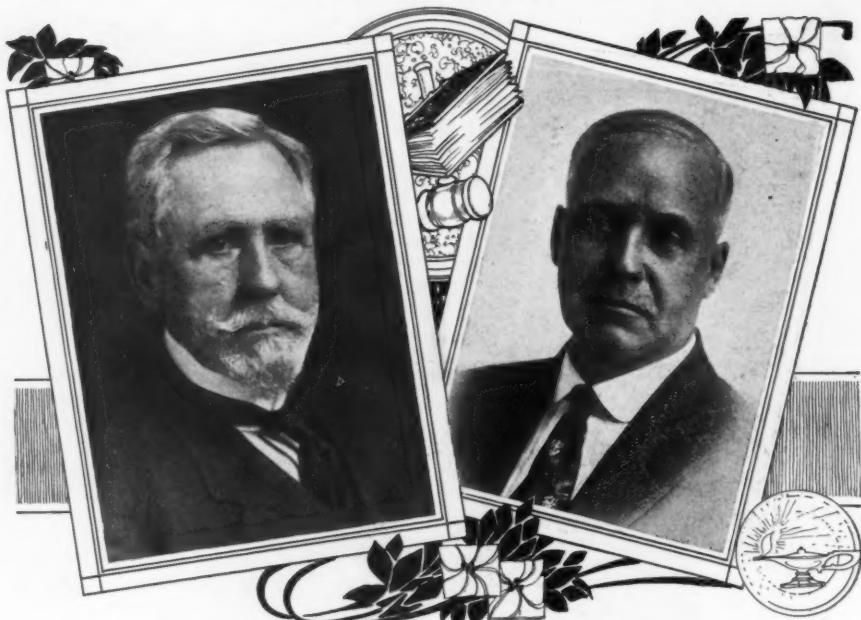
Although Nebraska has never yet elevated one of her native sons to her high bench, five of her judges were first admitted to the practice in the courts of Nebraska, several others practised less than one year in some other state before locating in Nebraska, and only three of the twenty-three judges were past thirty years of age when they came to this state.

Not only have the members of the court been essentially Nebraskan in their legal careers, but every member except one was born in the United States, and he came to Nebraska in boyhood. New York was the native state of Nebraska's first three judges, Lake, Mason, and Crounse; her justice of longest service, Maxwell, and her present chief justice, Morrissey. Illinois was the birthplace of an equal number: Justices Norval, Reese, Sedgwick, Sullivan, and Root. From Pennsylvania hailed Judges Gantt, Post, Rose, and Hollenbeck; and from Ohio, Judges Harrison, Barnes, and Hamer. Indiana furnished Justices Cobb and Holcomb; Wisconsin, Judge Fawcett; Iowa, Judge Cornish; and Missouri,

Judge Dean; while Judge Letton first saw the light among the heathered hills of Scotland.

In 1866, Judges George B. Lake, Lorenzo Crounse, and William A. Little were elected to form the first state court. Judge Little died before he could qualify for the office, and Honorable Oliver P. Mason was appointed the third member of the first court. Judge Mason became the first chief justice and served six years. In 1873, Judges Mason and Crounse were succeeded by Daniel Gant as chief justice and Samuel Maxwell as associate justice.

The first five judges, Lake, Crounse, Mason, Gant, and Maxwell, had all served as members of the territorial legislatures, and all except Gant as members of from one to three constitutional conventions. So it may well be said of this group of five founders of Nebraska's jurisprudence, that they assisted in all parts of the task of laying the foundation of the state, both enacting and administering its laws, forming its Constitutions, and shaping its policy.



HON. FRANCIS G. HAMER

Associate Justice

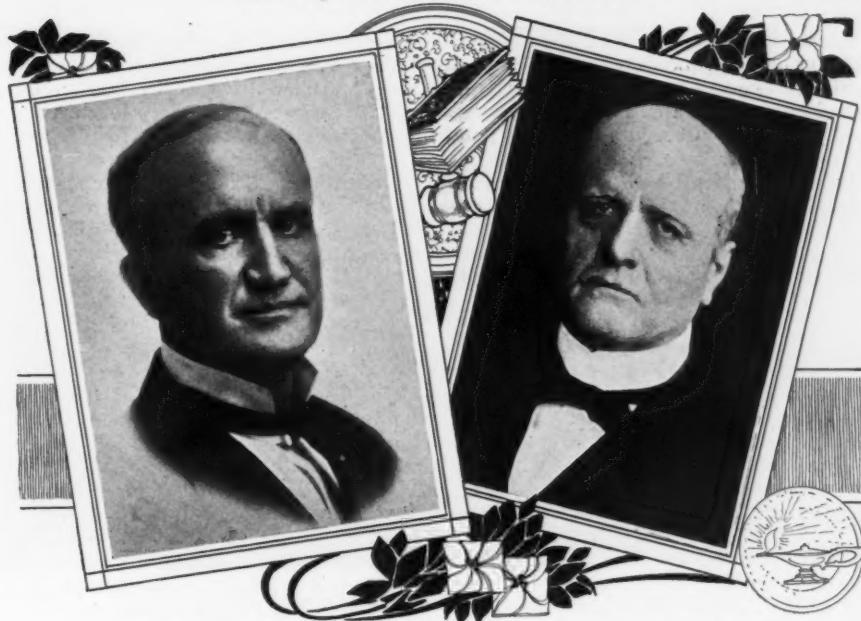
HON. JAMES R. DEAN

Chief Justice Mason settled at Nebraska City in 1855, and had a long active career in the state until his death in 1891. His marked power and individuality are stamped upon the early opinions of this court. He prepared the first important opinion handed down by the Nebraska court, in *Bradshaw v. Omaha*, 1 Neb. 16, which declared unconstitutional an act of the legislature extending the city limits of Omaha to include property not reasonably urban property, and authorizing the city to tax such land in aid of a railroad. His keen perception and vigorous expression were disclosed in his dissenting opinion in *People ex rel. Tenant v. Parker*, 3 Neb. 409, 19 Am. Rep. 634. His associates, Judges Crounse and Lake, each wrote an opinion holding that a proclamation by the executive convening a special session of the legislature might be revoked by a second proclamation. During the absence of the secretary of state, who was acting governor in the place of the regularly elected governor, who had been impeached, the president of the senate issued such a proclamation.

Upon his return to the state, the secretary of state revoked the first proclamation.

Judge Crounse was only thirty-two years of age when he was placed upon the first supreme court of Nebraska. In the thirty-six years intervening between his retirement from the bench and his death, he served four years in Congress, as Assistant Secretary of the Treasury under President Harrison, and as governor of the state in 1892-3. His opinion in *Brittle v. People*, 2 Neb. 198, stands as a monument to his work as a jurist. This opinion stated with clearness the history of the formation and adoption of the Constitution of 1866, and the condition imposed upon Nebraska by Congress to secure admission, that there should be no denial of the elective franchise, or of any other right, to any persons by reason of race or color, excepting Indians not taxed.

Born during the administration of John Quincy Adams, and dying eighty-four years later during President Taft's administration, Judge Lake filled out



HON. ALBERT J. CORNISH

Associate Justices

HON. SAMUEL H. SEDGWICK

fifty-four years of that long, busy career in Nebraska. He left Ohio after five years of practice, and came to this state two years after its formation as a territory. Ten years later he was chosen as a member of the first state court, and was re-elected at each recurring election until he had served sixteen years, and he then declined further service. A lineal descendant of Roger Williams, he showed an indomitable spirit of independence and perseverance that became such lineage. In his opinion in *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481, upholding the constitutionality of the Slocumb Liquor Law, he showed keen perception of the rights, powers, and duties of the several departments of the government, recognizing the line of demarcation between each, and confirming them by judicial decision. His opinion in the Pleuler Case clearly defined the rules of law upon which Nebraska based her strict regulation of the liquor traffic for thirty-six years, or until the adoption of the prohibition amendment in 1916.

Judge Gantt came to Nebraska from

Pennsylvania in 1857, practising law and holding office in territorial days, he served the last three years of his life as chief justice of the state. He was succeeded in 1878 by General Amasa Cobb, who remained on the court for fourteen years. Born in 1823, a native of Indiana, General Cobb served with distinction in the Mexican War, and commanded two different Wisconsin regiments in the Civil War. He also served Wisconsin in its state senate, and in the National Congress before coming to Nebraska in 1870.

Judge Samuel Maxwell became a member of the court in 1872, and so remained for twenty-two years, serving longer than any other member in the court's history, being chief justice four times. Judge Maxwell came to Nebraska in 1855, returned to Michigan for a legal education, and upon admission in 1859 came back to Nebraska and entered the practice. After his retirement from the bench he served in Congress. In addition to the arduous duties as a member of the court, Judge Maxwell was the author of *Nebraska Digest of 1877*;

Maxwell's Justice Practice; Code Pleading; Criminal Procedure, and Pleading and Practice. All of these works still stand out as Nebraska's standard works and guides on procedure, practice, and forms in their respective lines. Judge Maxwell contributed to Nebraska's jurisprudence not only the longest term of service, but his wonderful despatch of business, his ability to grasp the controlling question at issue and to discern the real merits of the controversy, assured an administration of justice in application of sound legal principles for the many years he served on the bench.

Supreme judges were elected in Nebraska on partisan tickets until 1914. Eighteen of the twenty-three members of this court have been affiliated with the Republican party, and the only two Democrats elected to this position prior to 1914, Judges Holcomb and Sullivan, were swept in on the crest of the Democratic-Populist fusion waves of 1898 and 1900.

In 1884, Judge Lake was succeeded by Judge Manoah B. Reese, of Wahoo, who served six years, and in 1908 was returned to the supreme bench, serving for seven years as the first chief justice after the abolishment of the rotation system. Judge Reese had been a member of the Constitutional Convention of 1875 and one of the early district attorneys of the state. After his retirement from the bench he practised law in Lincoln until his death on September 29, 1917. Judge Reese was followed on the court in 1896 by Judge T. L. Norval of Seward, whose successor was Judge Samuel H. Sedgwick, of York, who is now serving a third term on the court. Judge Cobb was succeeded in 1892 by Judge A. M. Post, of Columbus, who was followed in 1898 by another member of the Columbus bar, Judge John J. Sullivan, who has, since his retirement, twice declined appointment to vacancies on the court. Judge John B. Barnes, of Norfolk, came to the court in 1904, and served for thirteen years.

Judge Maxwell left his place on the bench in 1894 and was succeeded by Judge T. O. C. Harrison of Grand Island, who was in turn succeeded in 1900

by former Governor Silas A. Holcomb, of Broken Bow, and he was succeeded in 1906 by Judge Charles B. Letton, of Fairbury, who still remains a member of the court.

In 1908, when the court was enlarged by constitutional amendment to seven members, the four new places were taken by Judges William B. Rose, of Lincoln, who is a member of the present court; James R. Dean, of Broken Bow, who was returned to the supreme bench last fall; Jesse L. Root, of Plattsmouth, who was succeeded in 1912 by Francis G. Hammer, of Kearney, one of the present judges; and Jacob Fawcett, of Omaha, who retired from the bench this year. Judge Albert J. Cornish, of Lincoln, came to the court in January, 1917. Chief Justice Reese was succeeded in 1915 by Judge Conrad Hollenbeck, of Fremont, who was the first member of the court elected on the nonpartisan ballot. He died ten days after taking the oath of office. The present chief justice, Andrew M. Morrissey, of Lincoln, was appointed by the governor as his successor, and was elected to succeed himself in 1916, making the second chief justice to be elected as a "nonpartisan." At the same election, three associate justices were elected in the same way.

At three periods in the history of Nebraska, a supreme court commission has been provided to hear arguments and dispose of certain classes of cases. The present commission, formed in 1915, consists of Chairman William C. Parrott, of Auburn, Grant G. Martin, formerly of Fremont, and Fred O. McGirr, of Beatrice. Five of the twenty-two members of the two preceding commissions afterwards became supreme judges, and among the other seventeen were Honorable Frank Irvine, now of the New York Public Utilities Commission; Dr. Roscoe Pound, Dean of Harvard Law College; Judge C. S. Lobingier of United States Court for China; and Judge W. G. Hastings, Dean of Nebraska University Law College.

The court has at its command the second largest state law library in the country, affording access to all of the adjudicated cases of courts of last resort,



CONSULTATION ROOM OF THE NEBRASKA SUPREME COURT

commissions, and various tribunals throughout the United States, Great Britain, Canada, and practically every foreign nation. In her procedure, Nebraska is one of the group of "Code" states which follow the general rules of construction and liberal forms of pleading advanced by New York, though the Codes of Ohio, Michigan, and Iowa have had a marked influence on Nebraska jurisprudence.

The first case filed in the state supreme court of Nebraska, on September 6, 1867, *Roush v. Verges*, was later dismissed. The first case reported, 1 Neb. 3, was *Mattis v. Robinson*, filed in the territorial court as No. 154, and tried before territorial Judge Lockwood. It was argued by J. M. Woolworth and A. J. Poppleton, of Omaha, who became two of Nebraska's most eminent lawyers. Judge Crounse delivered the opinion, dealing with the right of a tenant to deny the relation and assail the landlord's title. The first criminal case reported, 1 Neb. 11, 93 Am. Dec. 325, was *People v. Loughridge*, relating to the bringing into this state by a thief of property stolen in another state.

Nebraska is recognized as one of the

leading states in agriculture. The sand-hill region of central Nebraska has developed into a great stock-raising "range." But Nebraska has the largest creamery in the country; its largest city, Omaha, ranks first in butter and dairy business and third as a stockyard and meat-packing center; Western Nebraska has several large sugar-beet factories; potash fields now threaten to outrival the wealth-producing oil wells that skirt the western border of the state, and all of the larger cities and towns of the state have numerous factories. So the Nebraska court gives attention to not only the same general line of cases as other agricultural states, but in some degree meets with such problems of litigation as come to the courts of large manufacturing and industrial states. Furthermore, the wide diversity of climatic and soil conditions between the rich "Missouri valley" and high arid altitude of the western "Panhandle" of the state causes Nebraska jurisprudence to present the unusual result of the same state court considering many drainage cases on one hand, and formulating a line of irrigation law on the other hand.

Nebraska has kept in the vanguard of the procession of progressive legislation of the past decade. This state ten years ago adopted the antipass laws and other strict regulatory matters relating to railroads and public utilities in general. In *Chollette v. Omaha & R. Valley R. Co.* 26 Neb. 159, 41 N. W. 1106, 4 Am. Neg. Cas. 835, 4 L.R.A. 135, it was held that a railroad could not escape duties imposed by law or liability for its acts, by selling the stock, or transferring the ownership or management of the road to another railroad or corporation. In *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689, 82 N. W. 26, 7 Am. Neg. Rep. 447, 55 L.R.A. 610, a statute was sustained which made carriers insurers of the safety of their passengers as they were of baggage and freight, and created a presumption that the accident was caused by the negligence of the carrier, or by its wrongful act, neglect, or default. In that case proof was excluded that the injury had occurred to the passenger in a wreck caused by the criminal act of a third person. The court sustained the Antipass Law of 1907, in *State v. Union P. R. Co.* 87 Neb. 29, 126 N. W. 859, 31 L.R.A.(N.S.) 657, and prevented not only free fares, but special contracts furnishing transportation in exchange for newspaper advertising and special services. A common carrier of live stock is prevented from relieving itself of liability for negligence by special contracts with the shipper. *Jeffries v. Chicago, B. & Q. R. Co.* 88 Neb. 268, 129 N. W. 273. In *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, it was held that a telephone company is a public servant, and can be mandamused to supply the public without discrimination. A statute fixing maximum charges by telegraph companies was long preceded by a decision in *Western U. Teleg. Co. v. State*, 86 Neb. 17, 124 N. W. 937, holding that telegraph companies are subject to acts relating to the prevention of abuses, extortions, and unjust discriminations by common carriers. An act fixing maximum rates for express companies was upheld in *State v. Adams Exp. Co.* 85 Neb. 25, 122 N. W. 691, 42 L.R.A.(N.S.) 396.

Nebraska has the direct primary law, initiative and referendum, state guaranty of bank deposits, employers' liability and workmen's compensation, "blue sky" and warehouse regulatory legislation, regulation of employment agencies and bureaus, nine-hour workday for women, child labor, and an unexcelled group of laws relating to food, dairy, drug, oil, hotel, and fire inspection. In the case of *Re Arrigo*, 98 Neb. 134, 152 N. W. 319, L.R.A. 1917A, 1116, the court held it within the police power of the state to forbid as "misbranding" the inclosure of gifts, premiums, and prizes in food packages. This prevents the insertion of toys, tickets, dishes, pictures, and advertising matter in crackerjack, coffees, oatmeal, and other food articles. The Nebraska court recently affirmed a large judgment for damages resulting from a violation of the state Anti-trust Law, through a combination and conspiracy of coal dealers to drive another dealer out of business. *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573. Agricultural and livestock interests in Nebraska are safeguarded with a pure-seed law which is unexcelled in any state, and a law creating an administrative live stock sanitary board, and strict quarantine and serum laws. The court sustained the validity of the law creating such a board and designating its powers in *Iams v. Mellor*, 93 Neb. 438, 140 N. W. 784.

The common law was applied to the rights of riparian owners in *Meng v. Coffee*, 67 Neb. 500, 108 Am. St. Rep. 697, 93 N. W. 713, 60 L.R.A. 910, and in *Crawford Co. v. Hathaway* (*Crawford Co. v. Hall*), 67 Neb. 325, 108 Am. St. Rep. 647, 93 N. W. 781, 60 L.R.A. 889, decided on the same day as *Meng v. Coffee*. It was said: "The two doctrines of water rights, one the right of a riparian proprietor, and the other the right of appropriation and application to a beneficial use by a nonriparian owner, may exist in the state at the same time, and both do exist concurrently in this state." The rapid development of irrigation is bringing on a line of decisions, which began back with *Com. Power Co. v. State Board*, 94 Neb. 613, 143 N. W. 937, and

Enterprise Irrig. Dist. v. Tri-State Land Co. 92 Neb. 121, 138 N. W. 171.

In 1916 the Nebraska court upheld the validity of a statute restricting the rate of interest to be charged by money lenders and loan sharks. Althaus v. State, 99 Neb. 465, 156 N. W. 1038.

In insurance matters, the valued policy law was held good in Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313, and recovery in case of total loss restricted to the value of the property named in the insurance contract; and in McElroy v. Metropolitan L. Ins. Co. 84 Neb. 866, 122 N. W. 27, 23 L.R.A.(N.S.) 968, note, where parties to an insurance contract are in different jurisdictions, the place where the last necessary act is done is held to be the situs of the contract.

Since Pleuler v. State, 11 Neb. 547, 10 N. W. 481, regulating the license of liquor sales, the Nebraska court has passed upon many cases involving suits upon bonds of liquor dealers. In Luther v. State, 83 Neb. 455, 120 N. W. 125, 20 L.R.A.(N.S.) 1146, note; 15 R. C. L. 246, it was held that the statute prohibited the sale of malt liquors without a license, whether intoxicating or not.

Two of the most interesting decisions made by this court in criminal cases are Brott v. State, 70 Neb. 395, 97 N. W. 593, 63 L.R.A. 789, wherein the conduct and behavior of bloodhounds was held not to be admissible as evidence to prove the scent of the accused and that of the perpetrator of the crime to be identical; and Schultz v. State, 89 Neb. 34, 130 N. W. 972, Ann. Cas. 1912C, 495, 33 L.R.A. (N.S.) 403, wherein defendant was found guilty of manslaughter for killing a person while running an automobile at an unlawful rate of speed. The most celebrated criminal case in the early history of Nebraska was Olive v. State, 11 Neb. 1, 7 N. W. 444, a murder case growing out of the long struggle between the cattle ranchmen and the early homesteaders. Among the counsel in that case were

Chief Justice Mason, Ex-Congressman Neville, father of the state's present governor, and Judge Hamer of the present court. One of the interesting cases in the political history of the state was State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602 (143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375), in which the right of Governor Boyd to that office was contested by his predecessor, Governor Thayer, because Boyd's citizenship was questioned. Governor Boyd was ousted from office and later restored on the final decision of the case by the Supreme Court of the United States.

An early interpretation by this court of a strict regulatory law was in Halter v. State, 74 Neb. 757, 121 Am. St. Rep. 754, 105 N. W. 298, 7 L.R.A.(N.S.) 1079 (affirmed in 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525), wherein the court sustained an act prohibiting the use of the national flag for advertising purposes. In that case the flag was desecrated by making it part of a trademark placed upon beer bottles.

The reported decisions of the Nebraska supreme court cover 101 volumes of Nebraska reports. On September 20, 1917, the number of cases filed in this court had reached 20,333, a volume of business approximately equal to many older and more populous states, such as Minnesota, Kansas, Louisiana. The number of volumes of decisions published in Nebraska exceeds that of many of the older states, and more than 600 decisions of this court have passed the critical censorship of L.R.A.'s editorial staff, and by publication or citation in that series been placed at the immediate command of the bar of the whole country and sister nations.

*Dale P. Stough*



# *Justice in the Army*

BY JOSEPH WHELESS

*Major Judge Advocate U. S. R.*



THE admirable regular Army of the United States, and the great democratic national armies which America is marshaling in this world war against war, are not wholly composed of fighting units of the invincible "Sammies." There are, besides, a number of highly important "staff corps," charged with the immense administrative work of the armies, and without the zealous and scientifically coordinated labors of which the fighting forces could neither exist, move, sweep from victory unto victory, nor be governed in military discipline, indispensable to efficient organization and to effective fighting. These several staff corps, with a bare hint of their respective duties, may be named in passing, to give a summary idea of the far-reaching and minutely detailed administrative organization of our Armies of Liberty.

The General Staff Corps is the highly technical corps of trained military experts, which, under the direction of the chief of staff, at present Major General Hugh L. Scott, renowned for his record as a fighter and a military diplomatist, is charged with all the problems relating to the efficiency of the armies, their operations, major and minor, the study of strategic questions in general, the collection of military information in all countries, the preparation of plans of campaigns, and the infinite details of general supervision over the military establishment in peace and war.

The adjutant general's department is the department of records, orders, and correspondence of the Army and the Militia, the custodian of the military archives, the channel of all official orders, instructions, and regulations issued to the troops, keeps the records of all enlistments and discharges, and prepares and

issues all commissions to officers of the army, besides a vast volume of related clerical and statistical work.

The inspector general's department exercises a comprehensive and general supervision over all that pertains to the efficiency of the Army, the condition and state of supplies of all kinds, of arms and equipments, of public property and moneys, and the accounts of all disbursing officers, etc., and the inspection of all branches of the service, with a view to its efficiency and improvement.

One of the most comprehensive and indispensable departments of Army administration is the Quartermaster Corps, which is charged with the great tasks of providing quarters, food, clothing, the material of war in all its forms, animals, transportation, payment of troops, and all financial duties assigned to it.

The Medical Corps, whose wonderful and efficient work is the admiration of all nations, and has wrought wonders of sanitary science and humanity throughout the world, is an especial pride of the service, with paternal solicitude and the most notable efficiency caring for the health and welfare of our troops under arms in camp and field.

Far from the least important of these is the Judge Advocate General's Corps, the department of the administration of military justice, the conservator and enforcer of discipline, the governor and balance wheel of the military establishment. From the earliest days of the Republic this branch of the Army administration has deserved and received the most solicitous concern of the government. The Army Regulations of 1835 contained a paragraph which serves today as the noble epigraph of the Department of Military Justice, inscribed as a legend on the frontispiece of the "Manual for Courts-martial," of 1917: "The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and

justice administered. The duties, therefore, that devolve on officers appointed to sit as members of courts-martial are of the most grave and important character." Paragraph 2 of the Army Regulations in force to-day is of like high tenor: "Military authority will be exercised with firmness, kindness, and justice. Punishments must conform to law and follow offenses as promptly as circumstances will permit."

The Judge Advocate General's Department is the smallest, and in no invidious sense the most select, of the Army Staff Corps. As doubled in personnel by the National Defense Act of June 3, 1916, this department consists of one Judge Advocate General, with the rank of brigadier general; four judge advocates with the rank of lieutenant colonel; and twenty judge advocates with the rank of major, a total of thirty-two. In addition, about sixty major judge advocates have been appointed, under the provisions of the above-mentioned Act of June 3, these having been selected, as I understand, with considerable embarrassment because of the very high character of the very numerous applicants, from among some of the most capable lawyers throughout the country. The chief of the Judge Advocate Corps is Brigadier-General Enoch H. Crowder, by privilege of birth a Missourian, by virtue of mind and character one of the ablest lawyers in the United States. General Crowder's great ability as a lawyer, and his immense capacity as a captain of men, are attested by his brilliant success

as provost marshal general of the United States, in working out the vast detail and carrying through to distinguished success of the monumental labors of the levying and mustering of the great national armies now starting to their camps under the operation of the great democratic "Selective Conscription" Law of Congress of May 18, 1917.

The commissioned judge advocates of the regular army are distributed, several in the general office at Washington, the others on the staffs of the respective commanding generals of the several territorial departments into which the country is divided for Army administrative purposes. This central department, with headquarters at Chicago, has for its department judge advocate, Colonel John A. Hull, since the Spanish-American War distinguished the service for his



*Photo by Clineland, Wash., D. C.  
From Underwood & Underwood, N. Y.*

**Provost Marshal General Enoch H. Crowder**

rank of major, a in this branch of legal acumen and administrative abilities, qualities which he has exemplified as judge advocate of the Philippines on two occasions, and in high jurisdictions within the states. Colonel Hull is the ranking colonel of the Judge Advocate Corps, and is first in line of promotion to the high position of Judge Advocate General of the United States.

As the legal aides to the department judge advocate are four major judge advocates of the United States Reserve Corps, who share the brunt of the enormous work of this office. These gentlemen, whom it gives pleasure to name, are Major Nathan William MacChesney, who in addition holds the position of Judge Advocate General of the Illinois

National Guard and Naval Reserve, with the rank of colonel, and is among the leaders of the Chicago bar and *literati*; Major Arthur G. Black of Kansas City, Missouri, a scholar and legal author of high repute; Major D. V. Sutphin, of Cincinnati, former judge of the superior court of Ohio, of rare legal attainments and exquisite personality; and, *Et tu, Brute*, the modest typist of this yet-to-be informative sketch. Our colonel ought to be proud of his "subs," and grateful for the load of work of which they appreciably, and I hope appreciatedly, relieve him. Since this paragraph was written, some two weeks ago, several rapid changes have occurred in this office: first, Major Black was sent out to be judge advocate of the post at Ft. Leavenworth, Kansas; and Colonel Hull and Major Sutphin have been detailed to the important work of the preparation and trial of the recent Houston riot cases, and have gone to the headquarters of the department at San Antonio. The whole work of this department has thus devolved upon Major MacChesney and myself.

Now for the duties of a judge advocate of the Army, and some of the incidents in their performance. These duties are like those devils which came down from among the tombs, their name is legion. The judge advocate is, in the first place, the legal adviser of the commanding general of the department,—in this central department, since the last few weeks,—Major General William H. Carter, veteran of over fifty years' service to his country, and called, like Cincinnati, from a modest, well-earned retirement, to the command of the greatest department of the Army, embracing all the central United States from the Alleghenies to the Rockies, and from Canada to the Gulf of Mexico.

A multitude of legal questions of every character, civil and military, from every department of the service, come into this office for opinions and decision. Most of these are concerned with Army administration; others involve, and the duties of the office require, competent knowledge of public, constitutional, and international law, the laws of war and martial law, public treaties, the Hague

and Geneva conventions, the laws of military government. But the duties of the department judge advocate are chiefly judicial; we sit as the supreme court of military justice of the central department. It is not a court of appeals; appeals are not known to military law. But every sentence of a military court, before it becomes effective, must perforce be referred to the commanding general and approved, disapproved, or modified by him as justice may require; and it is the judge advocate's office to take this reviewing action, and lay the result before the commanding general, who must, in person and by his own hand, sign every "action" taken, before it may be executed "by command."

Besides provost marshal courts and military commissions, not necessary to discuss here, there are three categories of courts-martial, which may be briefly defined. First is the general court-martial, composed of from five to thirteen officers, with jurisdiction to try any person subject to military law, for any crime or offense made punishable by the Articles of War, and to try any person who by the law of war is subject to trial by military tribunals for any crime or offense in violation of the law of war. This is a very sweeping jurisdiction, and embraces the penalty of death, the dismissal of commissioned officers, and the dishonorable discharge of enlisted men. Next is the special court-martial, composed of from three to five officers, with jurisdiction extending to all persons subject to military law, except officers (and other classes which may be exempted by the President), for any crime or offense, not capital, made punishable by the Articles of War; its power of punishment is limited to the imposition of confinement not to exceed six months and the forfeiture of six months' pay. Last is the summary court-martial, composed of one officer; a sort of military police court, limited to the punishment of soldiers by confinement not exceeding three months and the forfeiture of three months' pay. These several courts-martial are appointed, by special orders, by the superior military authority, according to the rank of the court. Courts-martial are not permanent and continuing

tribunals; they are appointed from time to time, as the needs of the service may require, by the "appointing authority," in the case of general courts-martial in this department, by the commanding general of the department; in the field, by the commanding general of the division, or other superior command. Such orders are in this form: "Headquarters Central Department. Special Orders No. 165. Chicago, Ill., August 2, 1917.—A general court-martial is appointed to meet at Fort Thomas, Kentucky, at the call of the President, for the trial of such persons as may be brought before it. Detail for the court: (Here follow by title and seniority the names of from five to thirteen officers; followed by Lieutenant So-and-So, Judge Advocate)." The personnel of the court and the judge advocate may be changed by orders at any time, and the court may be totally abolished by the appointing authority whenever so willed, and another court appointed or not, as deemed advisable.

While court-martial courts are of limited and special jurisdiction, which must clearly appear on the face of every record, they are constitutional courts, and their sentences, when approved by the appointing authority, are of the highest dignity and validity. Under the 92d, 93d, and 94th Articles of War, many nonmilitary crimes, such as murder, manslaughter, assaults, rape, arson, burglary, robbery, larceny, embezzlement, frauds, and perjury, when committed by persons subject to military law, are triable and punishable by courts-martial; and

many such cases come for review to this office, and constitute the principal burden of its work.

The procedure of courts-martial is the perfection of simplicity and expedition, putting to shame the archaic and cumbersome forms of the common and statutory criminal processes. This procedure is itself, of course, statutory, being § 1342 of the Revised Statutes of the United States, Comp. Stat. 1916, § 2308a, known as the Articles of War; the articles now in effect being an amendment of August 29, 1916, effective March 1, 1917. The Code of Court-martial Law is an admirable volume called, "The Manual for Courts - Martial;" this may be had of the Public Printer at Washington, for 60 cents, and should be read by every efficient lawyer and public man. A couple of

samples of the beautiful pleadings of military law must be cited, picked up at random out of a basketful of records lying before me for review. The first one at hand charges larceny. There are nine specifications of separate embezzlements, all alike except for names and items, so that but one will be quoted:

Charge: Violation of the 93rd Article of War.

Specification 1: In that Recruit Harley Dailey, Acting Corporal 15th Recruit Company, G. S. I., did, at Jefferson Barracks, Missouri, on or about the 21st day of May, 1917, fraudulently convert to his own use and benefit one suit, civilian, value about \$20, and private papers, the property of Recruit William Brown, Cavalry, intrusted to him by the said Recruit Brown.

(Signed) John G. Tyndall,  
Captain, Field Artillery.



MAJOR JOSEPH WHELESS

Captain Tyndall is the "officer preferring the charges." This is all there is of form and ceremony to a charge of crime before a court-martial; the charge is signed by any company officer to whom the complaint is made, or it may be signed even by a civilian complainant. Using this case of Dailey as a model, the process of bringing a case to trial before a court-martial may be sketched. When a complaint is made against a soldier, private or officer, or other person subject to military law, the commanding officer of the organization immediately concerned refers the matter to some junior officer for investigation; upon the report of this investigating officer and the preparation of the charges, the commanding officer determines whether, from his estimate of the nature and gravity of the offense, it should be tried by a summary, special, or general court-martial. The charges and specifications are drafted and written on a printed form called the "charge sheet," and are identical for whatever category of court-martial. If the case is to be tried by summary court, the commanding officer of the organization makes an "indorsement" thereon: "To Lieutenant Smith, Summary Court, for trial," or an appropriate and equally laconic recommendation for trial by special court-martial. In a case by its nature properly triable by a general court-martial, the proceeding is somewhat more formal. The trial judge advocate, who is usually a junior line officer detailed, and always designated in the orders creating the court and detailing its members, first examines all probable witnesses and secures a written synopsis of the testimony they are expected to give, both for the prosecution and for the accused. These statements of expected evidence, together with any documents in the case, and a statement by the accused, if he wishes to make any, in explanation or extenuation of his offense, are attached to the charge sheet. The commanding officer thereupon makes an indorsement, in substance like this one in the case of Dailey,—the brevity of language and many abbreviations used will be noted:

1st. Ind. Ret. Depot, Jeff. Bks., Mo., June 8, 1917. To the Comng. Gen. C. D., Chicago.

1. This case has been investigated as far as practicable at this depot by Captain W. W. McCommon, Infantry, and it is his opinion as well as mine that the charge can be sustained.

2. Trial by G. C. M. is recommended.

The charge sheet and attached papers are then forwarded by mail to the headquarters here and sent over to the judge advocate's office,—they come in by dozens daily. After being entered on the books they come to my desk, where they are carefully studied to see that the charge is laid under the proper Article of War covering in law the offense specified; that the specifications are properly drawn and properly state the elements of the offense charged; that the summary of evidence attached makes a *prima facie* case under each charge and specification; that records of previous convictions, if attached, are within the proper limits of time and jurisdiction and are properly authenticated. Not infrequently the papers must be returned to be corrected or supplemented in some of these particulars; or, if sufficient data appears, the correction is made by me. When the record appears in proper form and sufficiency, there is then attached to it the "reference sheet" or second indorsement, which I initial, in the present case as follows:

2nd. Ind. Hq. Central Department, Chicago. To A. G. Strong, 1st Lieut. C. A. C., Judge Advocate of the General Court-martial instituted at Jefferson Bks., Mo., by par. 7, S. O. 109, C. D. c. s.

1. The accused will be tried on these charges.

2. These charges, statement of service, and other proper inclosures will be returned with the proceedings. By command of Major General Barry.

After the case is tried, the stenographic copy of the testimony, stating the pleas, findings, and sentence, which latter are secret, and all attached papers, are promptly returned to these headquarters for review, and the study of the record is very promptly made by the judge advocates of this office, the seemingly just conclusion reached and formulated into the "action" of the reviewing authority, signed by the commanding general in person, in the form of a "General Court-martial Order," printed and promulgated; upon the receipt by the trial

court-martial of a copy of the order of promulgation, the sentence becomes effective and is executed. As the sentence in this Dailey Case has not at this writing been "promulgated," the forms of this action will be illustrated by another case lying before me.

The whole summary of the case is contained in the order of promulgation, one of which is copied here, showing the very concise form for a charge of first degree murder, the pleas, findings of the court, and the "action" of the reviewing authority (dictated by myself), such "action" being often the vehicle of expressing to the trial court sundry views of this office in respect to the way the case was tried:

(G. C. M. O. 637.)

Headquarters Central Department.  
 GENERAL }  
 COURT-MARTIAL } Chicago, Illinois,  
 ORDERS, NO. 637. } August 4, 1917.

Before a general court-martial which convened at Jeffersonville, Ind., pursuant to paragraph 5, Special Orders, No. 132, Headquarters Central Department, June 29, 1917, was arraigned and tried:

Private Lilborn L. Newton, Company M, 2nd Indiana Infantry.

#### CHARGE.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt. Lilborn L. Newton, Co. M, 2nd In. Inf., did at Jeffersonville, Ind., on or about the 18th day of May, 1917, wilfully, feloniously, with malice aforethought, unlawfully kill one John Sheffey, a human being, by shooting him with a rifle.

#### PLEAS.

To the Specification: "Not guilty."  
 To the Charge: "Not guilty."

#### FINDINGS.

Of the Specification: "Not guilty."  
 Of the Charge: "Not guilty."  
 "And the court does therefore acquit him."

#### ACTION.

In the foregoing case of Private Lilborn L. Newton, Company M, 2nd Indiana Infantry, in the preparation of the record there are numerous failures to comply with the form given in Appendix 6, Manual for Courts-martial, 1917. Subject to this remark, the acquittal is approved. Private Newton will be released from confinement.

BY COMMAND OF MAJOR GENERAL BARRY:  
 H. O. S. Heistand,  
 Adjutant General,  
 Department Adjutant.

A very common offense is that of desertion, and this charge presents the most

frequent occasion for a novel military style of pleading and findings, of "substituted" or "minor and included offenses." For instance, a charge of desertion (a capital "war-time" offense) with its "substituted" pleas and findings:

#### CHARGE.

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William N. Watson, Company H, 4th Infantry, did, at Gettysburg National Park, Penna., on the 1st day of July, 1917, desert the service of the United States, and did remain absent in desertion until he was apprehended at Martinsville, Ind., on the 10th day of July, 1917.

#### PLEAS.

To the Specification: "Guilty, except the words 'desert the service of the United States and did remain absent in desertion,' substituting therefor the words 'absent himself without proper leave, and did remain absent.' To the excepted words, not guilty; to the substituted words, guilty."

To the Charge: "Not guilty, but guilty of violation of the 61st Article of War."

In such case the "findings" may be either of "guilty," which means of the desertion as charged; or may substitute the words of the plea, closing: "of the excepted words, 'Not Guilty,' and of the substituted words, 'Guilty;'" and so of sundry "minor and included offenses" under various Articles of War.

The findings and sentences of general and special courts-martial are always secret; the members of the court and the judge advocate are sworn not to reveal them until duly promulgated. When the trial is ended, the court is "closed," that is, every one withdraws when the findings are made, the court is "opened," and the judge advocate reads then to the court certified copies of all "previous convictions" which the accused has had during his current enlistment and within one year next preceding any of the offenses for which he now stands convicted before the court; this for the purpose of grading the degree of his present punishment. So far as the punishment is concerned, it may extend from a reprimand to being "shot at sunrise;" in the case just cited the sentence read, that the court, upon being opened, sentences the accused: "To be dishonorably discharged the service; to forfeit all pay and allowances due or to become due

while in confinement under this sentence; and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years." It will be noticed that the trial court-martial does not fix the place of confinement in its sentence; this is left for the reviewing authority to determine. In the above case, and in the large majority of others where honorable discharge is imposed, we recite in the "action," upon approving or mitigating the sentence: "The United States Disciplinary Barracks at Fort Leavenworth, Kansas, is designated as the place of confinement, where the accused will be sent without delay." We often "mitigate" the severity of the sentences imposed; and where it does not exceed six months, order it executed "at the station of his company," that is, in the guardhouse of the soldier's company.

In certain cases, confinement in the penitentiary is awarded: when the sentence exceeds one year's confinement, for the military offenses of desertion in time of war, repeated desertion in time of peace, and mutiny; otherwise, in purely civil offenses, punishable by confinement in the penitentiary by Federal or state statute or by the common law as existing in the District of Columbia. We have not yet had any sentence of death, although many "capital" cases, such as desertion, sleeping on or abandoning post by sentinels, disobedience to lawful commands of superior officers, and a few others. We seek to temper military justice with human mercy, and to maintain discipline with firmness but kindness, in the spirit of the Army Regulations.—From "Reedy's Mirror." By permission.

### *Origin of Legal Systems*

Under what we may call the theocratic form of government the individual existed only as a means to the state to an end, personal rights and individual freedom were largely ignored, public and private rights were scarcely distinguished, and law was determined by tradition and was largely the growth of unconscious custom, without question of right or wrong, expediency or inexpediency. And yet from what was accepted as a divine revelation (Micah, vi: 8), the Justinian triad, that the whole duty of man was to live honorably, not to injure another, and to render to every man his due, there was slowly developed, in accordance with advancing morals and reason through the ages, and with the aid of the sages of the law, those wonderful maxims and that marvelous body of the Roman civil law which to-day forms the basis of all our modern substantive private law, together with a procedure entirely unlike anything we have inherited through the English common law. On the other hand, under the anarchical government of the northern barbarians, there developed a courageous and constant exercise of the feeling of individual right, a spirit of self-reliance which, from unmeasured violent self help, passed under the control of the growing state, was supervised and restrained, and there finally evolved, by way of the judicial duel and the wager by battle, that body of public law which is accepted by all self-governing nations to-day, and the procedure of our modern jury trials. On the one hand, we see Themis with her scales, on the other Odin, the God of Battles; on the one the judge as the conspicuous figure, on the other the contending advocates; on the one the principle, "Do no injustice," on the other, "Suffer no injustice" (see von Ihering's "The Struggle for Law"), the one feminine in spirit, the other masculine.—Percy Werner, Address before the Missouri Bar Association.

# The New York Legislature and the Torrens System

BY DORR VIELE

Of the New York Bar

President of The Associated Official Examiners of Title in the State of New York



THE system of evidencing land titles which was originated in Australia by Robert Richard Torrens about 1858 supplied the basis of the land title registration acts which have been enacted in various states of the Union since 1895.

The name Torrens system popularly given these acts has therefore a certain appropriateness and justice, though it is not precisely applicable. Sir Robert's great contribution was the creation of a concrete evidence of title in such form that the need of repeatedly examining a long succession of legal instruments embodying the history of a land parcel's ownership could be done away with by registering the present established owner, together with the details of his holding, on an official certificate for which, in case of a change in the ownership, a new certificate would be substituted. He gave the certificate its requisite conclusive force by backing it with an assurance fund, so that any error in registration, injuring one who was not recognized in the proceeding, could be compensated for by the Australian commonwealth, the possession of the land always remaining in the party registered as owner. Under the state acts a similar conclusiveness is essentially supplied by the judicial character of the act of registration effected through court proceedings in established forms. State insurance is superfluous. Perhaps it is advisable, therefore, to distinguish the "American Torrens system" or simply to refer to our state systems of "land-title registration."

The New York act was first adopted in 1908, to be in effect February 1, 1909. Its career at the hands of the statute makers has been one of turmoil or innocuous desuetude, according to the spectator's point of view.

There has never yet, for readily discernible reasons pointed out below, been any broad practical education of the public to the potentialities of this law. So the larger number of the amendments proposed at various intervals have come from the ideas of individual interest instead of being suggested by administrative experience, and but little notice has been paid generally to the amendments that have been adopted or to those proposed and not adopted. Indeed, despite the present popular interest, the system would probably not yet be in progress in this state had it not been for a comparatively small group of men. When the first registration bill was introduced in the legislature it failed of passage, but was followed by one<sup>1</sup> authorizing an honorary commission of experts on realty and law to study the subject and report the next year with a bill if they decided in favor of the system. Members of that commission, equipped by experience and by its researches, since sponsoring the law here have been recognized as its guardians in opposing some changes and approving others.

The changes made have been: In 1909 the act adopted as chapter 444 of the Laws of 1908—"An Act in Relation to Registering Titles to Real Property and Facilitating and Expediting its Consolidated Laws of New York State Transfer"—became by the passage of the an integral part (art. 12) of the Real

<sup>1</sup> Laws 1907, chap. 628.

Property Law, with consequent changing of the section numbers and with one minor formal addition.<sup>2</sup>

By 1910 there had been a sufficient number of completed cases to demonstrate both the essential soundness of the procedure and also that certain details could be advantageously altered. The filing of the action papers pending registration, for instance, was taken from the registrar and given to the county clerk as in other actions;<sup>3</sup> the official examiner's report for the court, generally voluminous, was to be filed in the clerk's office, but service of it on the attorneys appearing in the case could be omitted;<sup>4</sup> the requirement of a guardian *ad litem* was extended to every case, on account of the possibility of there being persons under legal disability among the defendants served under a general clause, and the time to apply for the guardian's appointment and his compensation were indicated;<sup>5</sup> discrepancies in the form of a supposedly identical clause in different portions of the act were removed,<sup>6</sup> and other minor niceties introduced,<sup>7</sup> such as the recital that a registered mortgage was subject to the mortgage tax as if recorded. The requirement of the original act, that among the defendants, particular and general, should be included the People of the state of New York and that a summons for them should be served on the attorney general, had led to considerable variations in practice by the forces of the latter officer in responding to the summons served in these cases, and this was relieved by adding a requirement for the complaint or application that it should state "what claim, if any, the state makes to the property in question or what interest, if any, it has therein other than the general governmental interest or such as exists as to all land in private ownership."<sup>8</sup>

Provisions requiring the plaintiff to file any original muniments of title he might

<sup>2</sup> Adding to those who by § 374 may be appointed as deputy registrars "an assistant dep. register appointed under statutory authority."

<sup>3</sup> By changes in §§ 370, 382, 393, 398, 410, 432.

<sup>4</sup> §§ 385, 386.

<sup>5</sup> §§ 388.

<sup>6</sup> §§ 379, 380, 391.

<sup>7</sup> §§ 379, 383, 387, 406, 416.

have and governing their subsequent withdrawal were dropped, and where a title to be registered was in part the same as that of other land to which the title was already registered, reference was permitted to the earlier filed official report, in lieu of duplicating it.<sup>9</sup> An important safeguard against frivolous objections to a suit for registration was provided, after making the official examiner's report presumptive evidence when it has been preliminarily passed upon by the court, in the requirement that if any defendant controverts any statement thereof he must specifically plead and set forth the controverting facts and establish them affirmatively.<sup>10</sup>

A title subject to restrictive covenants was permitted to be registered without bringing in as defendants the various persons entitled to enforce the covenants and without testing their validity, provided the judgment should show their existence and that it had not been disputed by the plaintiff.<sup>11</sup> The jurisdiction of the court was defined to be the same as in actions for which no order to issue the summons is required,<sup>12</sup> and the examiner reporting on the title was required to certify, prior to judgment, whether all taxes and assessments have been paid, unless the registration is to be made subject to any tax, etc.<sup>13</sup> The original form of the examiner's initial report was slightly modified at this time,<sup>14</sup> and, finally, to meet a possible ground for reluctance to enter the system without careful study, a procedure for withdrawing land from its operation after obtaining the benefit of the initial adjudication was contrived and added.<sup>15</sup> These changes were framed by members of the commission by which the act itself was framed, and were all effected by the single bill adopted as chapter 627, Laws of 1910. Through 1914 no further bills were adopted, though scattering suggestions were introduced.

Let it here be interjected that to one

<sup>8</sup> § 379.

<sup>9</sup> § 380.

<sup>10</sup> § 385.

<sup>11</sup> §§ 380, 390.

<sup>12</sup> § 385.

<sup>13</sup> § 390.

<sup>14</sup> § 434.

<sup>15</sup> § 404.

following the development of title registration in this country it seems plain that the retardation in this state of its wholesale use, as it may fairly be termed in contrast to Massachusetts, Minnesota, and Cook county, Illinois, though not in comparison with, for example, Colorado, is primarily due to the commission having followed too successfully the aim expressed in its report to "employ, as far as available, existing agencies and forces" and avoid the multiplication of officials to administer the new system. The functions could be, and were, apportioned among the existing county clerks, attorneys at law as title examiners, and the judges at the constituted special terms of the supreme court; but it is unfortunate that some officer not already engaged in earlier duties was not set up to be herald

and overseer of the new idea. Without oral exposition of the routine or chance for enthusiasm in its growth, with no official report even of what growth there is, how shall knowledge of the system spread?

In the city of New York the prevailing method of passing titles, by "title insurance policies," is conducted by companies which have secured in their own hands a practical monopoly based on the public records, and which constantly widely advertise their goods. Taking the hint, last year in Chicago the county authorities made an appropriation for advertising their Torrens system and conducted an intelligent propaganda in the press with the result that the volume of registration was almost doubled over that in the cor-

responding period of the year before. Some such step may be necessary to bring public realization that the state is able to relieve citizens from the future repetition of examination of their titles and of part of the expense of recording so many deeds. The law reports from time to time show numerous instances where registration and nothing else would afford just the relief needed. It awaits discovery by the majority of lawyers, as well as by the rest of the public. They are not yet aroused to the work of passing the multitudinous land parcels of the state once for all through the court in precise and correlated fashion.

Returning to the New York legislature, and without pausing to consider at length a number of suggestions which have been introduced in bills that failed of passage, such as

to require investments of savings banks in mortgages on real property to be only in mortgages on registered property (1916 Sen. Int. 69-§404), a new problem has been presented to the last three sessions through repeated efforts of the register of New York county, who is also registrar, under the statute, to change the judicial procedure of the statute now in force to more nearly the Australian system of money compensation for titles transferred by misregistration. The proposed changes in details made no harmonious whole, and included removal of the restriction on the registrar's appointment of deputies from among "official examiners" only; i. e., attorneys who have qualified before the state board of law examiners and one of the appellate



DORR VIELE

divisions, and insertion of authority for him to appoint as examiners "attorneys of at least ten years experience" residing in the county, at salaries to be fixed by him (subject to audit of the local authorities). The already-established form of action was to be styled a proceeding, without a summons, but with a new form of general notice. The antecedent report on the title for information for serving possible interests was to be omitted, and the Illinois form of report to the court after the return day of the notice was to be substituted, and a final order "with the effect of a judgment" was to be permitted on the failure to appear and object of all persons served with the notice. Included in the same bill of 1915 was the first suggestion to compel an actual payment of a tenth of 1 per cent of a property's value "as determined by the registrar, but not less than the last assessment for local taxation," into the registrar's hands for an "assurance fund" in place of the nominal constitutional safeguard of an optional provision in the original law.

The two provisions are to be carefully distinguished. Under the law as first passed, the registering owner could pay if he chose and have a claim for any injury done him by operation of the system *after initial registration*; *i. e.*, through clerical error of the registrar in making out a transfer certificate of title or in noting a lien. As the parties in interest will be represented personally at any transfer, the chance of such error may well be deemed negligible, and the owner might prefer to omit the small per cent payment and waive the contingent right to recover damages from the fund.

The amendment proposed to remove the limitation on recourse against the fund to those for damages after initial registration, and indeed if the changes in the form of action had been adopted, the principle of insurance by the state might have been the slim and only chance of the law's continuing to stand, in any shape.

<sup>16</sup> § 371.

<sup>17</sup> § 377.

<sup>18</sup> §§ 378, 379, 383, 384, 386, 393-395, 399, 400, 407, 408, 409, 411, 412, 413, 417, 418, 424, 434, 435.

This bill failed of passage, and one from the commission members enlarging the provision as to justices to attend to these cases passed only in the assembly. The next year saw a peculiar *denouement*.

Both of the last-mentioned bills were reintroduced in 1916 and the situation was made almost ludicrous by the introduction altogether of four pairs of bills, besides concurrent resolutions. Late in the session, after inconclusive public hearings before the standing committees at the Capitol, a special legislative committee was formed of the eight introducers of the bills and a chairman, and two additional hearings were held in New York for the proponents. A compromise of the various proposals was drawn by the committee itself as its report and bill, and upon all at the meeting agreeing that they would propose no further amendment to the procedure it was introduced in both houses and passed (Chapter 547).

The 1916 changes thus effected included from the commissioners' bill the fuller provisions as to designated justices;<sup>16</sup> an improvement in nomenclature, *i. e.*, examiner's *report* instead of his *certificate*, which was found apt to be confused with the registrar's certificate; extension to all counties of the provision that examiners might base their reports on abstracts made by a duly authorized corporation without the prior arbitrary restriction to counties not exceeding 300,000 population, and companies incorporated at least two years;<sup>17</sup> a number of formal verbal changes for better phrasing;<sup>18</sup> the fuller expression of certain procedural details (such as, that the official examiner making the report shall not act as attorney or counsel in an action; that the survey is to record the distance from adjoining streets,<sup>19</sup> and in the court's duty on the motion for order to issue summons, etc.,<sup>20</sup>) including a new section governing transfers on judicial sales<sup>21</sup> and making applications to the court in judicial proceedings affecting registered property for directions for the form of

<sup>19</sup> § 381 and see § 390.

<sup>20</sup> § 385.

<sup>21</sup> § 420a.

memorial,<sup>22</sup> and likewise on death of an owner of registered property.<sup>23</sup> A "registration copy" of a registered mortgage, like a certified copy of a recorded paper, is provided<sup>24</sup> and the procedure to cancel a tax lien is made express, also for revocation of a power of attorney.<sup>25</sup> A specific change made was that for the guardian *ad litem* for unrepresented parties under disability the state attorney general should serve, excepting where some interest of the state would be opposed (the order of appointment to be sufficient proof that no such interest exists), and receive no compensation, thereby lessening the costs.<sup>26</sup> The examiner's report is required to be served upon the attorney general.<sup>27</sup>

From the bill for which the register mentioned has claimed sponsorship were taken an authorization for the registrar in each county to designate a deputy or otherwise appoint a salaried examiner to act for the county in furnishing reports of title to any applicant owner at a fixed fee payable to the county,<sup>28</sup> retaining, however, the proviso that the appointee should have qualified as an "official examiner;" a suggestion from the Illinois procedure that an official examiner may sit as a referee;<sup>29</sup> a second authorization for him to base his report upon any official search or abstract or one issued by an authorized corporation;<sup>30</sup> and that the notice of *lis pendens* to the registrar be block indexed where that system is in use.<sup>31</sup>

The first of these additions—a salaried examiner, as adopted—is susceptible of becoming an advantageous factor in introducing the registration system for small properties. If the local county boards in the larger cities will but appropriate the necessary support for such an examiner, owners of the smallest properties will be enabled to get the reports necessary for seeking initial registration at fees commensurate to their assessments, which fees must be lower than even moderate charges for the examin-

ers practising on case work alone. Nor should this curtail the latters' employment on more important individual cases.

The other changes adapted from this bill abolished (by restoring § 404 to its original form) the option of withdrawing land from the registered system, which had been inserted by the 1910 amendment, and altered the assurance fund provisions<sup>32</sup> in the way outlined above in describing the 1915 bills, so that the expense of first registration has this slight addition of 1 dollar in the thousand dollars of taxed value. The registrar is also to make such charges for furnishing printed forms as he may fix, subject to the court's revision.<sup>33</sup>

Before leaving the subject of the assurance fund it should be noted that the sections governing it were entirely recast. The amounts paid are no longer to be invested apart, but handled as funds received for local taxation, and claims against the moneys credited to the fund, for damages because of registration of property in the name of an adjudged owner, are to be passed on by the registrar and corporation counsel, but if they reject them may be sued on. The fallacy in arguing that such a plan affords an extra security or lends confidence, as urged in a pamphlet by the sponsor, is apparent if consideration be given the inherent restrictions on the form of action to effect the first registration. If this is not in due form of law, it is not effective to define or settle interests, but is of no effect. A second action for a claim against a county or city fund has no meaning when there has been no first; when there has been an actual first action there can be no ground for a second.

To enlarge the statement at the outset of this article, American land-title registration is founded in effectively combining recognized canons on obtaining jurisdiction and proceeding with ordered justice, in a new form of real property action and of subsequently evidencing the result, the broad basis for which is

<sup>22</sup> § 422.

<sup>23</sup> § 423.

<sup>24</sup> §§ 416, 432.

<sup>25</sup> §§ 419, 421.

<sup>26</sup> § 388.

<sup>27</sup> § 385.

<sup>28</sup> §§ 432h.

<sup>29</sup> § 377.

<sup>30</sup> § 380.

<sup>31</sup> § 382.

<sup>32</sup> §§ 426 to 429.

<sup>33</sup> § 432j.

plainly set out in the opinion, American Land Co. v. Zeiss in the Supreme Court of the United States (219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200) and a governmental money guaranty has no place in it.

The actual public cost of the new system has not been estimated in this state in comparison with the present recording work. A beginning of such comparison in Massachusetts shows apparent savings, which will be augmented by the income of the "assurance fund" which in that commonwealth, and also as incorporated in the Uniform Land-Title Registration Law recommended by the National Conference of Commissioners on Uniform State Laws, is a treasury fund to accumulate to a certain figure after which its income will be applied towards the administrative cost of the system. It may be that in actual administration the New York fund now to accumulate will eventually be utilized in this way.

No changes were made in the law in 1917. Contrary to the understanding of the previous year, a strenuous individual effort appeared to be made to urge again the confiscatory proceedings and state or county insurance, but without gaining its object, although the bill introduced was represented to have broad indorsement and it passed the assembly. Collateral action pleasing to the believers in judicial registration amended the Banking Law specifically to authorize savings banks and other institutions in making mortgage loans to use the registered certificate for evidence of title.<sup>34</sup>

The proposal to create a state superintendent of title registration who should see to the uniform administration of the law in all counties and publish data on

<sup>34</sup> Laws 1917, chaps. 187 and 405.

its use was made just before adjournment of the session, and may be revived at the next. To create a responsible state head and thus center the impulse in favor of the new system may be the only step which will adequately develop the realization of what the general substitution of state registry will ultimately save in time, incidental expense, and ease of use as contrasted with the present chaos of records and private supplementary agencies.

Occasional use will not wait upon that step. Wherever intelligent, thorough explanation of registration—"the state certificate of title"—is undertaken, actual use results for the two purposes that in all localities have offered the motive to its first trial, *viz.*, either to test a title that the current mode of private examination has taken exception to, or to prove title for subdivision tracts. The latter exemplifies at once the wholesale saving of re-examination of the same documents for different near-by lots which are embraced in one action and designated by subplot numbers on the initial certificate from which the purchasers' separate certificates are copied. The actual former waste would ordinarily be disclosed in connection with parcels bought at different times only if neighboring owners should happen to compare their chains of title.

The actual case experience shows that the New York act has been shaped by the legislature for effective operation if the local county authorities will but carry out its provisions.

Dorr Viele



# *British Lawyers and Their Books*

BY FRED H. PETERSON

*of the Seattle Bar*



IT IS a noteworthy fact that the legal fraternity in this country has written few books relating purely to our profession. In addition to many eminent judges and renowned lawyers, there have been poets, novelists, and historians among our brethren of the bar, but a small number, comparatively, have published their reminiscences or autobiographies. On the contrary, British lawyers have to their credit many excellent volumes in biography and semilegal lore. Among the most celebrated we readily recall "Serjeant Ballantine's Experiences as a Barrister," a highly interesting and instructive book; "Recollections of Bar and Bench," by Lord Alverstone; "Reminiscences of a K. C.," by Thomas E. Crispe; and "Recollections of an Irish Judge," by M. McDonnell Bodkin, K. C., which are all delightful and profitable reading. Then there are books not purely biographical, but well arranged to convey knowledge of British jurisprudence, as "Builders of the Law," by Edward Manson, commencing with Lord Cottenham, who was chancellor in 1837, when Victoria ascended the throne, and ending with Lord Watson of our day. This book is of great value in affording American lawyers an opportunity to study British law and lawyers at close range, for it is written in a most fascinating style, abounding in terse statements of noted judges, whose brilliant careers are briefly delineated.

Anyone who has read the English reports will have observed the argumentative style of their decisions. Barristers are frequently interrupted and questioned during their arguments. In France judges never break into an argument of counsel, for the French Code prohibits

such interruptions. Elliott, *Work of the Advocate*, 405. A French author says of their judges: "The time spent in court is a time of repose, at any rate for judges to whom sleep comes at pleasure. But how hard it is to acquire the art of sleeping gracefully on the bench! There is always at least one judge who listens, the president sometimes, the three relieve one another by turns." Apparently about the only thing the judge may do to interrupt counsel is to announce: "The case is finished!" See *Le Palais de Justice de Paris*, pp. 71, 72.

President Grévy considered it one of the best attributes of the English bench that the judges condescended to argue cases with counsel. Whoever attended a British court may have observed the colloquial style, the apparent intimacy existing between the presiding judge and the trial barrister; and the frankness with which the latter speaks about the facts of his case and his client is in striking contrast with our methods of admitting nothing and denying everything.

It is said that Lord Watson was reproached by a barrister in private for his habit of frequently interrupting counsel, when his lordship blandly remarked: "You should not complain of that, for I never interrupt a fool!"

Another book much on the same order as the preceding is "Some Old Scotch Judges," by W. Forbes Gray. This begins with Lord Kames, who became a judge in 1752, and ends with Lord Cockburn, who died in 1854. There are twelve biographies in this volume, and it is evidence of the longevity of judges that their combined ages count up 918 years, which is an average of seventy-six years and six months. It has generally been asserted, and it is no doubt true, that the habitual use of strong liquor shortens life, yet if this book be correct it appears that Kames, who imbibed the

most Scotch whisky, lived to be 86 years, the oldest of them all, while Lord Newton, who was the most temperate, died at the comparatively youthful judicial age of 64.

Then there is another readable set of books by J. B. Atley,—“The Victorian Chancellors.” Here we learn of Lord Lyndhurst, born in Boston in 1772, living to the age of 91. He is the attorney general, Sir Charles Wolstenholme, in “Ten Thousand a Year.” That he did not leap to fame rapidly may be seen from his statement that “eight years passed before I earned enough a year to pay my laundress.” The versatile, quixotic Brougham is there described,—great not only as an orator, a lawyer, a parliamentarian, and a philosopher, but *facile princeps* in many avenues of learning. Irving Browne in a charming volume, “Short Studies of Great Lawyers,” wrote extravagantly of Brougham, saying: “He was the most extraordinary character and the greatest genius, in civil life, of the nineteenth century, and in what he achieved and in what he attempted but one other man can be compared with him. Brougham was as great in peace as Napoleon was in war.” The other extreme is found in the statement that if Brougham had only known a little law he would have known a little of everything. As usual, the “happy medium” is nearer correct.

These names and many others, Bacon, Erskine, Macaulay, that brilliant Orientalist, Sir William Jones, Curran, and the mighty Irish tribune, Daniel O’Connell, afforded splendid opportunities for literary men to write interesting and instructive biographies. In our time Lord Charles Russell, Sir Henry Hawkins, Lord Coleridge, and a host of other lawyers have contributed lavishly to legal literature, and the bar is fond of reading about their triumphs in the forum and on the rostrum.

In referring to Lord Coleridge, who, when chief justice, visited this country in 1883, one is reminded of an anecdote. In those days Emory A. Storrs was one of the great legal lights in Chicago. It seems he was concerned in arranging for a grand banquet in honor of the distinguished visitor. Storrs was always and

hopelessly in debt. When the assembled guests were about to be seated, it developed that some greedy creditor of Storrs had levied upon the spreaded feast to collect an unpaid judgment. Consternation reigned supreme; Storrs was appealed to for an explanation; nonplussed, but equal to the occasion, he instantly and nonchalantly remarked: “Gentlemen, if that be true, someone ought to pay the judgment; it surely would be a great pity to let the world know that the lawyers of Chicago suffered an execution to be levied upon the lord’s supper!” One of the guests who related this incident stated that the debt was adjusted, and Storrs abundantly repaid them by delivering a masterly address abounding in wit, pathos, and humor, for Storrs was a prince among orators, as the writer can attest.

Recently I read a book to much satisfaction: “Forty Years at the Bar,” by J. H. Balfour Browne, K. C. He practised at the parliamentary bar, mostly in proceedings where private property was to be taken for public use, known as “compensation cases.” This volume is full of shrewd observations, contains some good stories, and is epigrammatic in style. As an illustration, on page 260 he states: “It is not the certainty of the law, but the uncertainty, that pays the lawyer, and the uncertainty of the law is not greater than the uncertainty of the judges who administer it.”

Apparently there is a good reason why British barristers are inclined to write their reminiscences, and American lawyers are averse to it. There the great offices in the gift of the government,—which is the successful party at the polls,—the lord chancellor, chief justice, attorney general, and solicitor general, are bestowed upon the foremost lawyers, partly because of political services and influence; and the other judges are largely appointed for the same reason; this offers a distinguished legal-political career at the bar, unknown to our system of government. Also the distinction between barrister and solicitor has developed and fostered an *esprit de corps* impossible in this country.

The barrister is aloof from the ordinary affairs of life. He follows the in-

structions of the solicitor and represents the client in court only. There is opportunity for idealism, and the barristers are likely to hold to strict professional ethics; in brief, we have largely commercialized the legal profession as a whole, as all are affected alike, for the lack of this division.

The British solicitor is the business lawyer; he attends to the affairs of clients and is the business getter of the barrister. If there be any commercialism, it is practically confined to the solicitors. However, there is no probability that we will ever adopt their system, while our democratic methods and ways in business and professional life continue.

Some meritorious legal biographies have been published in this country. "Great American Lawyers" is a most excellent work. Henry L. Clinton wrote "Extraordinary Cases" and "Celebrated Trials," which include only cases in which he acted as counsel; they are really autobiographic, but of much general interest and of historical value.

"Landmarks of a Lawyer's Lifetime" is a well written book by Theron G. Strong. There are many others of great excellence, but most of them consist of a collection of speeches, rather than of professional or political experiences.

These views find support in a pleasing volume by the Hon. John M. Gest, judge of the Philadelphia orphans' court, entitled, "The Lawyer in Literature," where one may readily see that the law and literature of foreign countries appeal to American lawyer-authors more than our own; for he refers to the law and lawyers of Dickens, Scott, and Balzac; crabb'd old Coke and the English law. Scarcely a reference is had to our law or literature.

It is like traveling: lofty mountains, beautiful natural parks, and many attractive objects may be seen in our own country, but they lack the perspective of history and the glamour and mystery of romance. Yet we go to foreign lands where the old swinging lamp of Galileo in the Cathedral of Pisa; or a streamlet, the Rubicon; or the insignificant pass of Thermopyle, becomes of surpassing interest, not because of what the eye sees, but what imagination adds to reality:

Turns them to shapes and gives to airy nothing  
A local habitation and a name.

The Inns of Court and Temple Church are the most interesting objects to an American lawyer in the British metropolis. Headlam in his "Inns of Court," page 9, published recently, says: "The four Inns of Court survive to-day as instances of the old Guilds of Law in London, and the lawyers, in their relations with the courts, the public, and solicitors, seem to represent still a highly organized Trade Union."

Temple Church in Fleet street, dedicated in 1185, of Norman architecture, once the property of the Knights Templar and Knights Hospitallers, is replete with historic incidents. There in the garden, in an obscure corner, lie the remains of genial, generous Oliver Goldsmith, the author of "The Deserted Village;" Hooker, renowned for his "Ecclesiastical Polity;" Selden, and many others famous in law, letters, and statecraft, are remembered here, "in storied urn and animated bust."

Thackeray, who had chambers in Brick Court, portrays in Pendennis a law student indulging in poetical fancies as he passes historical chambers, saying: "Yonder Eldon lived; upon this site Coke mused upon Littleton; here Chitty toiled; there Barnwell and Alderson joined in their famous labors; here Byles composed his great work upon bills, and Smith compiled his immortal leading cases."

And again, in reading Shakespeare's Henry VI., we are reminded that in the Temple Garden occurred the celebrated meeting between the rival leaders of the York and Lancaster factions, claimants to the throne of England, which led to the Wars of the Roses. After Richard Plantagenet, later Duke of York, had plucked a white rose, and Somerset snatched a red rose, the Earl of Warwick, known as the King-maker, remarked:

And here I prophesy: this brawl to-day  
Grown to this faction in the Temple Garden  
Shall send between the red rose and the white  
A thousand souls to death and deadly night.

The omniscient guide, for a consideration, of course, still points to the very

bushes from which these roses were plucked.

That a profession which bears historic relation to the Knights Templars, and had within it apprentices, esquires, serjeants, and the "Order of the Coif;" that for centuries maintained the "Inns of Court and Chancery;" that records an unbroken line of illustrious names from the days of Aula Regia to Westminster Hall,—should have clustered

about it romance and ancient etiquette, peculiar rules and patent of precedence, is but natural; and it is this *tout ensemble* which has made it possible for its votaries to write entertaining reminiscences and charming and instructive biographies.

### *A Potential Portia's Plaintiff*

I've threaded the mazes  
Of contracts and sales  
Through technical distinctions misleading;  
I've learned when a tort  
May be sued ex contractu,  
But I'll never learn Common Law Pleading!

I can give you verbatim  
Both murder and treason,  
And other crimes justice impeding,  
I know when an agent  
Becomes a bailee,  
But I can't explain Common Law Pleading.

I can translate "delegatus non potest delegari,"  
"Damnum absque injuria's" light reading;  
"Non est factum," "nil debit," are music  
to me,  
But the *Lost Chord* is Common Law  
Pleading.

I've discussed woman's wrongs under  
old common law,  
For reforms in her lot interceding;  
But woman's fair hand,  
Rocking cradle and earth,  
Can't budge, even, Common Law Pleading.

Ye lawyers of old,  
With your hair-split decisions,  
Your minds on technicalities feeding,  
Did you know you would be  
Storing trouble for me,  
When you thought out this Common  
Law Pleading?

'Tis said we find Heaven  
Right here on this earth;  
And it's Hades, too, for the unheeding;  
If Love is the one, as all poets tell us,  
The other is Common Law Pleading!

J. J. F.

# *Christmas Wills*

BY E. VINE HALL

of London, England.

*Author of "The Romance of Wills and Testaments."*



THE practice of bequeathing gifts for distribution at special times and seasons is of common occurrence in wills, and of such times Christmas is a favorite choice.

Testators have a kindly custom of remembering the exhortation of Thomas Tusser :

At Christmas be merry and thankful withal,  
And feast thy poor neighbors, the great with  
the small;

and they sympathize still with the sentiment of "Poor Robin's Almanac" for 1684 that

Tobacco and a good coal fire  
Are things this season doth require.

So Mr. E. R. Blatchley of Barrow, Suffolk, who died in 1915, left to the people's churchwarden of Barrow a piece of land in trust to apply the income therefrom in the purchase of tobacco, to be distributed at Christmas each year.

Izaak Walton, who died in December, 1683, appreciated the necessity of the good coal fire, but he realized that the necessity is greatest, as a rule, a little later than Christmas time. In his will he left the residue of the rent of certain property to buy coals "for some poor people that shall most need them" in the town of Stafford, "the said coals to be delivered last week in January or in every first week in February; I say then, because I take that time to be the most pinching times with poor people; .and God reward those that shall do this without partiality, and with honesty and a good conscience." Similarly, a few years ago, a testatrix left £250 to the vicar and churchwardens of St. Philip and St.

James at Ilfracombe, in Devonshire, to apply the income annually in the month of February in the purchase of coal, to be distributed in quantities of a quarter of a ton among the poor of the parish of fifty-five years of age and upwards.

But coal is more commonly provided at Christmas. An annuity of £100 was lately left to the poor of Melton Mowbray, to be laid out each Christmas in the purchase of clothing for destitute children, and of meat, blankets, and coal for the aged poor. A barrister who died in 1913 at the age of thirty-five left £200 to the vicar of Birley, Leominster, to apply the income in the purchase of coal for distribution at Christmas amongst the poor of the parish as he in his discretion should decide.

Mr. Robert Furber, of Bryant's Hill, Bristol, gave by his will, proved a few years ago, £3,000, to apply the income towards the salary of the minister of the Wesley Memorial Chapel, Bryant's Hill, and in providing for the children and teachers attending the Sunday schools belonging to the chapel a tea on June 17 in each year (or on the following day if that were a Sunday), such date being the anniversary of the birth of John Wesley, and £1,000 to apply the income in the purchase of coal for distribution about Christmas time for any deserving poor persons in the district of Bryant's Hill.

And to go back to remoter times, John Champneys in 1529 gave to poor households in Greenwich on St. Thomas's even before Christmas, either in wood or coal yearly, the sum of 6 shillings and 8 pence.

To feast their poor neighbors also testators have not been unmindful at Christmas time. A bequest of £1,000 was recently given to provide Christmas and other treats for the patients and staff of Ashton-under-Lyne infirmary, and £250 was left by another testator to supply

Christmas gifts of meat and groceries for aged and poor widows in Gateshead. William Taylor, as Mr. Virgil M. Harris reminds us in "Ancient, Curious, and Famous Wills," directed by his will, dated February 6, 1735, that a good wholesome dinner should be provided on December 26, yearly forever, to certain poor women inmates of Bridgnorth Almshouses in Shropshire. Mrs. Mary Mason, by will dated October 24, 1811, left the interest of the residue of her property to be applied as follows: One third in giving to the poor of the parish of Bexley, Kent, a comfortable dinner of beef and bread on Christmas Eve; one third to be distributed at the same time in coal to such poor families as should stand in need thereof; and the remaining third to be divided on Midsummer day among poor and deserving persons who had brought up the greatest number of children without parochial relief.

Mr. T. S. Geere, of Leytonstone, who died on May 3, 1914, bequeathed £100 to the vicar and churchwardens of the Parish Church of West Ham, upon trust for the purchase of seasonable food and drink to be distributed, on Christmas Eve in each year, to inmates of the Roger Harris Almshouses, being communicating members of the Church of England. Mr. George Neve of Sissinghurst, Cranbrook, Kent, gave £100 to the incumbent for the time being of Trinity Church, Sissinghurst, to apply the income for a Christmas dinner for the deserving poor of the parish without distinction as to creed. He recommended that the bequest should be carried out on similar lines to what had been his practice in his lifetime; *viz.*, 2 lb. of beef (free from bone) to each spinster, bachelor, widow, or widower, and 3 lb. for each married couple.

John Angell, by his will dated September 21, 1774, provided similarly, saying: "And as it has been long a custom in my family to give away here at Stockwell on

the 21st of December 3 pence apiece to all quite poor and impotent men and women, that shall come for it, and 2 pence for other poor men and women, and a penny a piece to children, I will and desire this custom be forever kept up. And as it has been also a custom to give on the said 21st of December or soon afterwards to the poor housekeepers of the neighborhood about a stone of beef each, my will is that this custom also be forever kept up, and that the expense of both these articles be charged on my estates in Lambeth."

December 21st, St. Thomas's day (as in the will above, and as in the will of John Champneys referred to before), is frequently taken as the date of distribution of such charitable bequests. Thus, at St. Gregory's Church, Sudbury, on St. Thomas's day, a number of stockings, boots, and shirts are given away to the poor of the parish, in pursuance of the will of Thomas Carter, who died in 1706.

The inscription on this testator's costly tomb is one of the curiosities of the church. "Traveler, I will relate a wondrous event. On the day on which the aforesaid Thomas Carter breathed his last a Sudbury camel passed through the eye of a needle. If thou hast wealth, go and do likewise. Farewell."

Lastly, there are found such tender touches as these in the will of a late town clerk of Monmouth, who died in 1915, aged 72. He left to the Monmouth General Hospital and Dispensary, for the children's ward, in memory of his darling child Lizzie, £500 and a framed portrait of the child, and desired the authorities to place on her grave a wreath of flowers each Palm Sunday and a wreath of holly each Christmas Day.

*E. Vine Hall*



# Right to Discharge an Attorney

BY WILLIS A. ESTRICH

of the Ohio Bar



HE relation existing between attorney and client is a form of agency. The rights and liabilities of the parties are governed by the terms of the contract entered into by them. It seems clear that the client

may be given the right by the express terms of the contract to discharge the attorney without cause at any time, and that under such a contract he may exercise such right.

In the absence of any express stipulation as to the right of discharge, the right of the client in this regard is governed by the other terms of the contract of employment. In this respect contracts of employment may be divided into three general classes: (a) Contracts of employment for a definite time; (b) Contracts of employment for a specified purpose; (c) General contracts of employment which are neither for a specified time nor for a specified purpose.

It seems clear that, in case of an employment for a specified time, the client cannot discharge the attorney without cause before the expiration of the time fixed without committing a breach of his contract, for which the attorney may recover in a proper action.<sup>1</sup> It has been held that an attorney thus discharged, who has entered upon the performance of his contract and continued during the period thereof ready and willing to perform, and who does not by any act or engagement incompatible therewith incapacitate himself from its performance,

may recover the stipulated sum agreed upon as compensation for his services.<sup>2</sup> In fact a recovery of the entire sum agreed upon has been allowed without reference to the ability and willingness to complete the term of service.<sup>3</sup> And an action in damages for breach of an agreement by a bank to employ an attorney for a year has been sustained where the attorney was discharged without cause about a month after the beginning of the year.<sup>4</sup>

It seems clear also that, in case of a general employment not for a specified time nor for a specified purpose, the client has the right to discharge the attorney at any time without cause, just as a master who has employed a servant under like circumstances may discharge him at any time without committing a breach of his contract.

In cases of employment for a specified purpose, there is a dispute as to the right of the client to discharge his attorney without cause before the purpose for which he was employed is accomplished. Before proceeding to a discussion of the cases dealing with this situation it is necessary to recall some general principles of agency. The distinctive thing about an agency is the power of the agent to represent the principal and bind him upon a contract. It is a well-settled principle of agency that this power of representation may be terminated at any time with or without cause, unless it is coupled with an interest, and this is held although the agency is termed exclusive or irrevocable, or it is expressly agreed that the agency shall continue for a certain period.<sup>5</sup> But it does not follow that because this power of the agent to represent

<sup>1</sup> Horn v. Western Land Asso. (1875) 22 Minn. 233; Orphan Asylum v. Mississippi M. Ins. Co. (1835) 8 La. 181; Price v. Western Loan & Sav. Co. (1909) 35 Utah, 379, 100 Pac. 677, 19 Ann. Cas. 589; Dixon v. Volunteer Co-op Bank (1913) 213 Mass. 345, 100 N. E. 655.

<sup>2</sup> Horn v. Western Land Asso. (1875) 22 Minn. 233.

<sup>3</sup> Orphan Asylum v. Mississippi M. Ins. Co. (1835) 8 La. 181.

<sup>4</sup> Dixon v. Volunteer Co-op. Bank (1913) 213 Mass. 345, 100 N. E. 655.

<sup>5</sup> Mechem, *Agency*, 2d ed. §§ 563, 565, 566.

the principle may be terminated at any time, that the principal has the right to so terminate it. He may have expressly negatived this right in his contract. If he has negatived this right in his contract, he is liable in damages for breach thereof, upon revoking contrary to the terms of the contract.<sup>6</sup>

According to the weight of authority, when a client has employed an attorney for a specified purpose, such as the conducting of a certain suit, he has negatived this right to discharge the attorney before the suit has been terminated. If he does discharge the attorney before the purpose for which the attorney has been employed has been accomplished, he has committed a breach of his contract;<sup>7</sup> at least if the services have been substantially rendered, only a small residue remaining to be performed.<sup>8</sup>

But other cases hold that a client has a right at any time to dismiss without cause an attorney employed for a special purpose without committing a breach of his contract.<sup>9</sup> Some cases applying this doctrine limit it to a dismissal before the litigation has been substantially completed.<sup>10</sup> This is the theory applied in a recent decision of the New York court of appeals.<sup>11</sup> The reasoning by which the court arrives at this conclusion is, in brief, as follows: "That the client may at any time, for any reason, or without any reason, discharge his attorney, is a firmly established rule. . . . If the client has the right to terminate the rela-

tionship of attorney and client at any time, without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract." If the New York court of appeals, in making the statement that it is firmly established that the client may discharge the attorney without cause at any time, uses this language in the sense that the client has power to terminate the authority of the attorney to represent him, it may be admitted that the court is correct, but upon this construction the conclusion that the client is not liable in damages for so doing does not follow. The first premise of the court must be construed as regarding as well settled, not only the power of the client to terminate the authority of the attorney to represent him, but also the right to do so. This, as has been shown above, is not settled in the way regarded by the New York court of appeals, either as applied to agency generally or, according to the weight of authority, as applied to attorney and client. It is conceivable that, since the power to represent the client may be terminated at any time without cause, unless coupled with an interest, the position may be taken that there is an implied condition read into every contract between attorney and client, that the client shall have the right to do this. Of course, if this is a condition of the contract, no breach of contract is committed in the discharge. But such an implied condition seems to

<sup>6</sup> Mechem, *Agency*, 2d ed. § 568. See discussion in note to Cloe v. Rogers, 38 L.R.A. (N.S.) 366, upon this point as it relates to real estate brokers.

<sup>7</sup> Brodie v. Watkins (1878) 33 Ark. 545, 34 Am. Rep. 49; Moyer v. Cantieny (1889) 41 Minn. 242, 42 N. W. 1060; Shevalier v. Doyle (1911) 88 Neb. 560, 130 N. W. 417; Dorshimer v. Herndon (1915) 98 Neb. 421, 153 N. W. 496, 154 N. W. 207; Carlisle v. Barnes (1905) 102 App. Div. 573, 92 N. Y. Supp. 917, appeal dismissed in 183 N. Y. 567, 76 N. E. 1090. But see New York cases cited in note to Scheinesohn v. Lemonek (1911) 84 Ohio St. 425, 95 N. E. 913, Ann. Cas. 1912C, 737; Smith v. Lipscomb (1855) 13 Tex. 532; Crye v. O'Neil (1911) — Tex. Civ. App. —, 135 S. W. 253; Sessions v. Warwick (1907) 46 Wash. 165, 89 Pac. 482; Such v. Bank of State (1903) 121 Fed. 202. See also Mt. Vernon v. Patton (1879) 94 Ill. 65; Scobey v. Ross (1854) 5 Ind. 445; Philbrook v. Moxey (1906) 191 Mass.

33, 77 N. E. 520; Johnston v. Cutchin (1903) 133 N. C. 119, 45 S. E. 522; Henry v. Vance (1901) 111 Ky. 72, 63 S. W. 273.

<sup>8</sup> MacKie v. Howland (1894) 3 App. D. C. 461; Eastman v. Blackledge (1912) 171 Ill. App. 404; Kent v. Fishblate (1915) 247 Pa. 361, 93 Atl. 509; Bermant v. Keveney (1915) 88 Misc. 527, 150 N. Y. Supp. 949, affirmed in (1915) 170 App. Div. 898, 154 N. Y. Supp. 1111.

<sup>9</sup> Louque v. Dejan (1911) 129 La. 519, 38 L.R.A. (N.S.) 389, 56 So. 427; Martin v. Camp (1916) 219 N. Y. 170, 114 N. E. 46, L.R.A.—, —; Re Rosedale Ave. (1916) 219 N. Y. 192, 114 N. E. 49; Roake v. Palmer (1907) 119 App. Div. 64, 103 N. Y. Supp. 862.

<sup>10</sup> Parish v. McGowan (1912) 39 App. D. C. 184. See MacKie v. Howland (1894) 3 App. D. C. 461, *supra*.

<sup>11</sup> Martin v. Camp (1916) 219 N. Y. 170, 114 N. E. 46, L.R.A.—, —.

be negatived from an employment for a specified purpose. It seems reasonably certain that a contractor who has secured a contract for the construction of a building cannot be discharged by the owner without cause at any time the owner chooses, without committing a breach of his contract; that is, the employment of a contractor for a specified purpose negatives the right of the owner to discharge the contractor until such purpose is completed. It is true the owner may choose to breach his contract and terminate the right of the contractor to proceed with the work. In such a case, however, the owner must respond in damages for the breach. It seems the same result should follow in case of a contract between an attorney and client for the conduct of a suit, unless there is something peculiar about this relation which distinguishes it in this regard from other contracts. That there is such a distinction seems to be the real basis for the decision that the client may discharge his attorney in such a case. This is clearly the basis of the decision of the New York court of appeals<sup>11</sup> in which it is stated that "the contract under which an attorney is employed by a client has peculiar and distinctive features which differentiate it from ordinary contracts of employment." The cases which deny the right to discharge impliedly deny the existence of such a distinction.

There are many practical considerations against the rule that a client may discharge his attorney in such a case. This is especially true where there is an employment upon a contingent fee or for a stated compensation for the entire employment. Where the compensation of the attorney is contingent, as, for example, upon the successful outcome of the suit, it is ordinarily fixed at a higher figure in case of such successful outcome than it would be in case of payment regardless of the outcome. If the client may discharge his attorney at any time without cause, he may wait until the litigation has taken an advantageous turn, then discharge his attorney and relegate him to an action upon the *quantum meruit*, thus working a hardship upon the attorney. If in such a case the court refuses to apply the rule—and it seems

likely that in some of the jurisdictions which adhere to this rule it would so refuse—an element of uncertainty is introduced which in the end will work more hardship upon the client than the opposite rule, which is certain and definite in application. An element of uncertainty has been introduced into the rule as laid down by the New York court of appeals, for that court says that "what has been said declaratory of the rule that the attorney is limited to a recovery upon a *quantum meruit* does not relate to a case where the attorney in entering into such a contract has changed his position or incurred expense." The court does not advise what change of position would work this result, but it seems that an attorney by the very act of accepting employment has changed his position in that he thereby disqualifies himself from accepting the employment by the opposite party. If the mere acceptance of employment does work such a change of position as was in contemplation of the court, it seems that every case can be brought within the exception.

Many questions arise upon the compromise or settlement of a suit in which an attorney has been employed, but these for the most part have to do not with the right of the client to discharge the attorney by compromising or settling the suit, but to the matter of the attorney's compensation.<sup>12</sup> It seems clear that an attorney employed to conduct a suit has no right to have the suit continued if his client determines in good faith to compromise or settle his cause of action. It has been stated to be a rule of general acceptance "that a provision of a con-

<sup>11</sup> A discussion of various phases of this question may be found in the notes to Lawyers Reports Annotated. See particularly the note to Jackson v. Stearns, 5 L.R.A.(N.S.) 390, dealing with the effect of the dismissal of suit to defeat an attorney's lien on claim to compensation. See also the note to Schmitz v. South Covington & C. Street R. Co. 22 L.R.A.(N.S.) 776, dealing with the basis for computing the share of an attorney entitled to certain proportion of the recovery where the suit is compromised for a certain sum and attorneys' fees.

The rights and remedies of an attorney whose client compromises a cause of action without his consent before action brought is discussed in the note to Winslow Bros. Co. v. Murphy, 45 L.R.A.(N.S.) 750.

tract by which an attorney is retained to conduct certain litigation, and by which he is to receive as compensation a certain percentage of the recovery, or a certain amount of money or property, if he succeeds in obtaining a determination of the controversy favorable to his client, gives to the attorney no interest in the cause of action which will preclude his client from entering into an amicable adjustment and dismissal of the suit, if there is no fraud or collusion to deprive the attorney of his just compensation. And so it is generally held under such circumstances that an attorney may not prosecute the suit to final determination, which is the particular course of proced-

ure that attorneys seek to adopt as a means of protecting their rights; and the courts have permitted suits to be dismissed by the parties against the objection of the attorney, or have refused to vacate a dismissal upon his application in actions of various kinds.<sup>13</sup> And it has been generally held that a clause in a contract between an attorney and his client whereby the attorney's right to compensation is expressly made contingent upon the successful prosecution of the suit, which provides against settlement without the attorney's consent, is invalid as antagonistic to those considerations of public policy which favor an amicable adjustment of litigation.<sup>14</sup>

<sup>13</sup> Note to Stearns v. Woolenberg, 14 L.R.A. (N.S.) 1095.

<sup>14</sup> Note to Re Snyder, 14 L.R.A. (N.S.) 1101.

*Willis A. Estrich*

## *His Recompense*

If a lawyer, musing sadly,  
Feels he's needing money badly,  
He may very well deliberately pause,  
For perhaps in his confusion  
He may harbor a delusion,  
And imagine he is needy without cause.

Rich in all to life essential,  
Money seems inconsequential  
To a ruler in the realm of common sense;  
And a man should not be grieving  
If no coin he is receiving,  
While he garners philosophic recom-  
pense.

After all our toil and striving  
We can never be deriving  
Earthly gain that has a goal beyond the  
grave,

And 'tis worth a man's endeavor  
To be happy, and forever  
Free from longings that his nobler self  
enslave.

Then dismissing mad desire,  
Things that perish to acquire,  
Let us strive with nobler aims for better  
things,  
Leaving avarice behind us,  
Doing nothing to remind us  
Of the discontentment money-getting  
brings.

*Wm. J. Allen*

# *Liberty—Its Substance and Its Shell*

BY HON. A. O. STANLEY\*

*Governor of the State of Kentucky*



E ARE in the midst of a conflict of ideas and of arms that has affected all the nations of the earth, and bespattered the map of the world ident, in announcing with blood. The President of the entrance of this Republic into this all-embracing havoc, used this remarkable language:

We are now about to accept the gauge of battle with this natural foe to liberty, and shall, if necessary, spend the whole force of the nation to check and nullify its pretensions and its power. . . . We are but one of the champions of the rights of mankind. . . . A steadfast concert for peace can never be maintained except by a partnership of democratic nations. . . . It must be a league of honor, a partnership of opinion. . . . The world must be made safe for democracy.

This democracy for which more than half the civilized nations of the world are to battle and for which vast regions have been devastated and millions of men have been slain, must indeed be a priceless thing purchased, as it is, at such a stupendous cost of blood and treasure.

The armed legions of all the world are now arrayed under the banners of democracy and autocracy, and we are told that upon the fortunes of war depend the liberties of mankind.

Is this not the time for men learned in the law and in the history of these institutions to ask and to answer the question—"What is this democracy for which we are piling up hecatombs of the slain?" What is this autocracy—more to be dreaded than death? "The world," says the President, "must be made safe for democracy." What kind of democracy? Are these nations to be democracies in a narrow and technical sense? Is univer-

sal revolution to follow in the wake of the overthrow of the Hapsburg and the Hohenzollern? Is this government to abandon its republican form, to abrogate its Constitution, and are all men to participate equally in the exercise of authority? Are the four or five thousand citizens of this country, the half million in the state, or the twenty millions in the nation, to meet in vast assemblies and, by count of noses in the midst of confusion and tumult, to enact laws, organize armies, and dispense justice? To ask the question is to answer it.

Are we to believe, are we to accept literally, the metaphors of impassioned orators? Are stars and garters and titles of nobility, thrones and crowns and scepters, all to be buried with those who died for the liberation of mankind? Does it mean that we are fighting to do away with all social distinctions, orders, and nobility and the institution of monarchy itself? The first hundred thousand Englishmen who met the shock of the Prussian advance at the Marne and whose thinning ranks day by day rivaled in their intrepid disdain of death, the charge of the Light Brigade at Balaklava, whose attenuated lines, in the face of overwhelming numbers, clung to the blood-soaked earth and fought on until there was left but the wraith of the proud army and the pathetic memory of a heroism unexcelled in all the red annals of war; these men were the flower of the English gentry. There is not a noble house in all England that does not mourn the loss of a heroic son, for that army was annihilated—its memory is immortal. Will England at the close of this war, rob the widows of her gallant defenders of their coronets, or their orphans of titles which their martial sires have worn with honor for centuries? No thoughtful man can believe that social distinctions will be obliterated in the world as the result of this

\* Address delivered before the Kentucky State Bar Association on July 5, 1917.

conflict, no matter what the result may be. Will Italy depose her martial King? Will England topple the Crown of George V. from the head of that prince who now shares, in the reeking trenches, all the privations and perils of the common soldier? Will Belgium renounce the knightliest of her defenders and order the noble Albert to share the humiliation of Nicholas or the exile of Constantine? This democracy is not inconsistent, then, with social or political inequalities, or the dominion of Kings. What, then, is this democracy? Is it a figure of speech? Is all this fine talk about the liberation of the world designed only to lure men on to privation and death? What is the vital and fundamental difference between the governments of the Sultan, the Emperor of Austria and the Kaiser, and that of this "partnership of nations?"

That fundamental difference, as I see it, is to be found, not in the government's form, but in its essence; not in the shell, but in the substance of liberty. The citizens of France and the subjects of the Kings of Belgium and Italy and England differ from the subjects of the Sultan, the Hapsburg, and the Hohenzollern in this, that they have wisely thrown about themselves impenetrable barriers which no king or parliament can pass, and the guaranty of that measure of personal liberty or freedom from governmental interference is to be found in the constitution of the government. That, as I see it, is the essential difference and the only difference between the so-called autocratic rule of the Central Powers and the vaunted democracy of the Allied nations.

For centuries, these peoples now aligned in hostile array have differed in their conception of liberty and of the purposes, powers, and extent of government. With the decay of the Feudal System, the power once wielded by the barons was centered among the Teutonic peoples in a prince, an elector, or a petty king. The devotion of the German to his chief, so vividly described by Tacitus in his day, made the transition from the rule of the Feudal lord to the single prince, natural if not inevitable. The smallness of these states, the nearness of

the prince to his subjects, and that affectionate obedience which characterized the primeval warrior, all paved the way for the establishment of many petty despots which were in the fulness of time to be fused and welded into a consolidated Empire by the martial prowess of Von Moltke and the genius of Bismarck.

#### An Analysis of the "Casus Belli."

I trust you will bear with me in a brief analysis of this fundamental concept of liberty, which as a *casus belli* has involved a world in war.

"Eternal vigilance," said Jefferson, "is the price of liberty." It may be lost by a confounding of the shell and the substance. Those visible forms of government ordained to preserve it are often mistaken for the thing itself, as forms and ceremonies are often confounded with religion. Many there are who mistake a republican form of government for the thing it was designed to preserve and protect.

A virtuous and enlightened people can, in my opinion, enjoy a higher degree of civil liberty and a greater measure of freedom from governmental interference in their private affairs under such a form than any other, but it is not necessarily so. The right of suffrage should not be restricted by property or other such qualifications, but the right to vote does not make men free. Despotism has and does exist, clothed in the guise of a republic, and the tyrant's power is not necessarily alleviated by the suffrage of the citizen.

For six centuries the Roman Emperors were elected by the people, but Tiberius, Domitian, Caligula, and Nero were none the less monstrous for that reason. "The Imperial Government," said Gibbon, "as it was instituted by Augustus . . . may be defined as an absolute monarchy disguised by the forms of a commonwealth. The masters of the Roman world surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable masters of the Senate, whose supreme decrees they dictated and obeyed."

Just to the south of us, across a shallow river and an imaginary line, lies a Republic, in its external features similar

to our own,—but a tyranny more intolerable than the rule of a khedive or a satrap.

Forms of government and the details of their administration are but means to an end, and that end is the same in every civilized community,—the immunity of the citizen from the lawlessness of the individual, on the one hand, and the unwarranted aggression of the government, upon the other. The precious thing is the right to live one's own life untrammeled by official and governmental interference, so long as the citizen in the enjoyment of that freedom abstains from infringing upon the same rights and privileges enjoyed by his neighbor. Said the French Commune:

The rights of every citizen end where the rights of every other citizen begin.

The same idea is profoundly elaborated by that great English political economist, John Stewart Mill:

Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every individual human being which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. . . . I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.

The governments of the Central Powers and of the Allied nations to which I have referred do not differ in form so much as in essence. The thing to which these democratic nations cling is this measure of liberty secured to the citizens by constitutional guaranties. The Teutonic governments are essentially paternal. Their laws are sumptuary, and since the Teutonic subjects regard that as a virtue which we abhor as the worst of governmental vices, this irreconcilable conflict of ideas, incapable of adjustment by reason or argument, must be left to the arbitrament of the sword; since powerful princes at the head of their docile but determined legions are prepared to

impose this odious thing upon their unwilling neighbors.

The German thrills at the thought of national grandeur, but he is indifferent to the independence of the individual. To him the country is the Fatherland, and a paternal direction of every detail of his domestic, industrial, and political life is accepted as wise and beneficent. Frederick the Great is, to this day, referred to as Father Fritz, and his subjects saw no impropriety when that testy old tyrant caned lads in the streets for truancy from school. Voltaire declared that Prussia was an army with a country. Prussia is more than that. It is under an absolute and ubiquitous discipline, permeating every nook and corner of its political life; whether an armed camp or the scene of peaceful enterprise, depends upon the whim of an autocrat. In industry and in arms alike, the governmental control is the same. This, the subject does not regard as oppression. He accepts it as a matter of course, his obedience is docile and implicit; held in a legislative straight jacket he regards it, not as a yoke, but a crutch. He would be helpless without it. This yielding of the individual initiative, this voluntary transfer of the right to control the operations of individuals and communities in peace and war to governmental discretion, is universal. German Socialism and German Autocracy are but poles of the same battery. They would, it is true, direct the activities of the government in opposite directions and make different classes the beneficiaries of its favor. A military cult would use this all-enveloping authority for the benefit of the many, but neither would limit its extent or curtail its power.

From this far-reaching and intermeddling vice, the Englishman instinctively revolts.

#### The Essence of the English Constitution.

Eight centuries ago, still bound by the shackles of feudalism, he demanded from the Crown, not favors, but justice. The first royal grant wrung from the usurper, Henry Beauclerc, antedates the Great Charter by more than a century.

Those barons who met a coward King

at Runnymede, unlike the French Encyclopedists and the German reformers of 1840, wasted no time in obscure or academic discussions of liberty, fraternity, and equality. They uttered no platitudes, no sophomoric declamations, or oratorical tributes to freedom. With an unobstructed vision, they saw with startling distinctness certain essential rights which they determined to make inalienable. The love of liberty with them was not an emotion, but a fixed purpose, to obtain and to enjoy a definite and concrete thing, which they described by metes and bounds. They stood self-reliant and erect; strong and powerful figures were they; and through the vista of centuries they have commanded the admiration of mankind. They sought neither aid nor emoluments from the Crown. They only demanded that they be allowed to take care of themselves. They forbade the pernicious interference of the Sovereign himself with the rights, the property, and the person of the individual, and with that they were content. Says Green, the English historian, in analyzing this memorable document:

The boon of free and unbought justice was a boon for all, but a special provision protected the poor. The forfeiture of the freeman on conviction of felony was never to include his tenement, or that of the merchant his wares, or that of the countryman his wain. The means of actual livelihood were to be left even to the worst. The undertenants or farmers were protected against all lawless exactions of their lords in precisely the same terms as these were protected against all lawless exactions of the Crown. . . . "No freeman," ran the memorable article that lies at the base of our whole judicial system, "shall be seized or imprisoned or dispossessed or outlawed, or in any way brought to ruin; we will not go against any man nor send against him, save by legal judgment of his peers or by the law of the land." "To no man will we sell," runs another, "or deny or delay, right or justice."

With infinite patience, with indefatigable and ceaseless vigilance, with an iron resolution that no royal power could divert or resist, these same champions of the rights of men availed themselves, through long centuries, of the necessities and the fears of the weak and the aspirations of the strong among all the succeeding Kings to confirm and to enlarge the concessions of the Great Charter.

These liberties were granted under the hand and seal and made sacred by the solemn oaths of Kings. From the death of Henry I., less than forty years after the Norman Conquest, until the time of Charles I., no English King ever dared to openly repudiate these charters or to deny to Englishmen the rights they were designed to preserve, and the despot whose temerity tempted him to that atrocious deed paid the price at Whitehall with his head.

In demanding the concurrence of the King to the Petition of Rights of 1628, Hume quotes the Commons as addressing a recalcitrant King as follows:

That the statutes, said the partisans of the Commons, which secure English liberty, are not become obsolete, appears hence, that the English have ever been free, and have ever been governed by law and a limited Constitution. Privileges, in particular, which are founded on the Great Charter, must always remain in force, because derived from a source of never-failing authority, regarded in all ages as the most sacred contract between King and people. Such attention was paid to this charter by our generous ancestors, that they got the confirmation of it reiterated thirty several times. . . . They have established it as a maxim *that even a statute which should be enacted in contradiction to any article of that charter cannot have force or validity.* But with regard to that important article, which secures personal liberty, so far from attempting, at any time, any illegal infringement of it, they have corroborated it by six statutes, and put it out of all doubt and controversy. If in practice it has often been violated, abuses can never come in the place of rules; nor can any rights or legal powers be derived from injury and injustice. But the title of the subject to personal liberty not only is founded on ancient, and therefore the most sacred, laws; it is confirmed by the whole analogy of the government and the Constitution.

This aversion of paternalistic and sumptuary legislation has grown with the passing years, and England's present abhorrence is reflected in the vigorous periods of Macauley.

That the duties of governments are paternal, says he, is a doctrine which we shall not believe till he can show us some government which loves its subjects as a father loves his child, and which is as superior in intelligence to its subjects as father is to a child. . . . Why should they not take away the child from the mother, select the nurse, . . . fix the hours of labor and of recreation, prescribe what ballads shall be sung, what tunes shall be played, what books

shall be read, what physic shall be swallowed? Why should they not choose our wives, limit our expenses, and stint us to a certain number of dishes of meat, of wine, and of cups of tea?

#### Origin of the Constitution.

It may be truly said that the Constitution of the United States was brought over in the Mayflower. The framers of that instrument did not invent a new system of government,—they adopted the principles of the Great Charter. They enlarged those principles to meet other conditions, and to secure to a happier people a wider measure of individual independence. Says Hugh Legaré:

Our written constitutions do nothing but consecrate and fortify the "plain rules of ancient liberty" handed down with Magna Charta, from the earliest history of our race. Before the colonies existed, the Petition of Rights, the Magna Charta of a more enlightened age, had been presented in 1628, by Lord Coke and his immortal compatriots. Our founders brought it with them, and we have not gone one step beyond them. They brought these maxims of civil liberty, not in their libraries, but in their souls; not as philosophical prattle, not as barren generalities, but as rules of conduct; as a symbol of public duty and private right, to be adhered to with religious fidelity; and the very first Pilgrim that set his foot upon the rock of Plymouth stepped forth a living constitution, armed at all points to defend and to perpetuate the liberty to which he had devoted his whole being.

The essential difference between our own and the English Constitutions is to be found in the condition which produced them. The Englishman secured certain immunities from the King, guaranteed by a solemn contract under a royal seal. Those who wrote our Constitution acknowledged allegiance to no king. The rights which it secures are derived from the King of Kings. Having shaken off the authority of the mother country, the peoples of these several colonies found themselves the repositories of all authority, and devested themselves of only so much thereof as was necessary to the formation of an organized society. By the very terms of the instrument itself, "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

An organized society was formed by

having this citizen confer certain authority upon officers of the law, his servants, not his masters, commissioned for a fixed time, to discharge specific duties, necessary to protect and secure him in possession of property and the enjoyment of life and liberty. The total of the authority thus conferred became the commonwealth, when these commonwealths, for the sake of mutual protection, "formed a more perfect union," the aggregate of the powers expressly delegated by the states formed the Federal government. But the fountain, the source of all authority, was the citizen. This was the cardinal principle of Jefferson's philosophy; the sovereignty of the states was but a corollary; the largest measure of individual liberty, not state rights, was the *summum bonum* of his whole system of government. The individual was surrounded by the precinct, or township, the county, the state, the nation, like so many concentric circles, and each in proportion of its nearness to the citizen was invested with the greatest possible jurisdiction. Each served a double purpose. It prevented encroachment of one citizen upon the rights of another, and presented between all and the ambition of a tyrant a series of stubborn barriers, each of which must be demolished before the liberties of a people could be engulfed in a compact Federal despotism.

#### Tyranny of the Majority.

Are these rights so sacredly safeguarded through the centuries, now endangered by the prowess of Prussian arms? I think not. The insolence of the autocrat has aroused enemies who have sprung up like the fabled dragon's teeth in two hemispheres and who will presently overpower him; but were he to devastate all Europe, make of it a waste like blackened Belgium, he could not crush under his iron heel these principles so dear to the hearts of men who for generations have maintained them. The danger, as I see it, is from within, not without. If lost, it shall be not from the oppression of an invader, but the excesses of the people themselves. It is unspeakably sad,—the contemplation, that those principles which are now defended by the valor of heroes may be endan-

gered—are endangered, by the excesses of the populace or by the venality and subservience of self-seeking politicians. A majority which refuses to a minority those sacred rights which for so many centuries Kings have not dared to invade, necessarily becomes an oppressor more odious and more intolerable than a King. Despotism without a despot is impossible. A multitude exempt from every character of constitutional limitation and unrestrained by every authority save its own whim is infinitely more menacing to the liberties of the citizen than the single despot, because there is no escaping its oppression—it is argus-eyed and ubiquitous. "When the Roman Emperors were at the height of their power the different nations of the Empire still preserved the manners and customs of great diversity; although they were subject to the same monarch most of the provinces were separately administered; they abounded in powerful and active municipalities; and although the whole government of the Empire was centered in the hands of the Emperor alone, and he, and he always, remained, upon occasions, the supreme arbiter in all matters, yet the details of social life and private occupations lay for the most part beyond his control."

This tyranny of the majority is the despotism from which wise political economists and the most learned and deserving students of our affairs have repeatedly warned us. Lord Macauley, in a vivid prophesy, has declared that that is the rock upon which the American ship of state must ultimately and inevitably break. It was a danger of which framers of the Constitution were conscious, and from which they wished to preserve us by every conceivable precaution, and by provisions in the instrument itself most explicit and emphatic. The adoption of a Constitution is in itself the best evidence that a majority is not at all times and under all circumstances to be trusted with the exercise of uncontrolled and plenary power. Could the organic law be amended at will by a bare majority, the Constitution would inevitably sink to the level of a mere statute, with no other force or validity. Constitutions are ordained, not primarily for the reg-

ulation of the affairs of the citizen or the punishment of his offenses, but to limit and define the authority of officials and the powers of legislative assemblies. By the adoption of the Constitution a wise people deliberately place bounds and limitations upon their own action and upon the activities and authority of their representatives. Popular assemblies, great multitudes, like individuals, are at times swayed by passion and prejudice, and sensible of this fact, in their desire to protect certain rights from their own ill-considered or impulsive action, they secure them—not by statutory enactment, but by the more secure and enduring means of a constitutional provision. Says John Stewart Mill:

The importance of this consideration in respect to political freedom has in general been quite sufficiently recognized, at least in England; but, many in later times have been prone to think that limitation of the powers of the government is only essential when the government itself is badly constituted; when it does not represent the people, but is the organ of a class, or coalition of classes; and that a government of sufficiently popular Constitution might be trusted with any amount of power over the nation, since its power would be only that of the nation over itself. This might be true, if the nation, in such cases, did not practically mean a mere majority of the nation, and if minorities were only capable of oppressing, but not of being oppressed. Experience, however, proves that the depositaries of power, who are mere delegates of the people, that is of a majority, are quite as ready (when they think they can count on popular support) as any organ of oligarchy, to assume arbitrary power and encroach unduly on the liberty of private life. The public collectively is abundantly ready to impose not only its generally narrow views of its interests, but its abstract opinions, and even its tastes, as laws binding upon individuals. And the present civilization tends so strongly to make the power of persons acting in masses the only substantial power in society, that there never was more necessity for surrounding individual independence of thought, speech, and conduct, with the most powerful defenses, in order to maintain that originality of mind and individuality of character, which are the only source of any real progress, and of most of the qualities which make the human race much superior to any herd of animals.

Says De Tocqueville:

A majority taken collectively may be regarded as a being whose opinions, and most frequently whose interests, are opposed to those of another being, which is styled a mi-

nority. If it be admitted that a man, possessing absolute power, may misuse that power by wronging his adversaries, why should a majority not be liable to the same reproach? Men are not apt to change their characters by agglomeration; nor does their patience in the presence of obstacles increase with the consciousness of their strength. And for these reasons I can never willingly invest any number of my fellow creatures with that unlimited authority which I should refuse to any one of them.

And again :

If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force.

Hamilton expresses the same opinion in the Federalist :

It is of great importance in a Republic, not only to guard one part of the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature, where the weaker individual is not secured against the violence of the stronger.

Jefferson foresaw the same danger and concurs in the same opinion :

The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come.

We are perhaps too near our own institutions and too accustomed to them to see those defects which are most apparent to the foreign critic. De Tocqueville is, in my opinion, the most acute and discerning of modern critics of our institutions; and I believe that his weighty and cogent observations on this subject deserve at your hands the most careful and earnest consideration.

I believe, says he, that it is easier to establish an absolute and despotic government amongst a people in which the conditions of society are equal, than amongst any other; and I think that if such a government were once established amongst such a people, it would not only oppress men, but would eventually strip each of them of several of the highest qualities of humanity. Despotism, therefore, appears to me peculiarly to be dreaded in democratic ages. . . . I had remarked

during my stay in the United States, that a democratic state of society, similar to that of the Americans, might offer singular facilities for the establishment of despotism. . . .

He then portrays this remarkable picture of that despotism he dreads :

I seek to trace the novel features under which despotism may appear in the world. The first thing that strikes the observation is an innumerable multitude of men all equal and all alike. . . . Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications, and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks on the contrary to keep them in perpetual childhood. . . . For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasure, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances,—what remains, but to spare them all the care of thinking and all the trouble of living? . . . I have always thought that servitude of the regular, quiet, and gentle kind which I have just described, might be combined more easily than is commonly believed with some of the outward forms of freedom; and that it might even establish itself under the wing of the sovereignty of the people.

Here is the most vivid picture I have yet seen of the all-embracing and pernicious paternalism of the Prussian autocracy. Would it be less intolerable if imposed by a multitude than by a single military satrap? Are these dangers unreal—imaginary? Have Macauley, Mill, and De Tocqueville no reason to dread this lamentable ending of the once free institutions established in America? Are there none now who boldly proclaim the absolute right of an omnipotent and imperious majority to reek its unrestrained will without regard to the rights or privileges of the minority? What is the meaning of the referendum and recall? That all law shall first originate with, and then be determined by, the absolute decision of a majority. When an ex-President of the United States advocates the recall of judges and demands the review of their learned decisions by tumultuous assemblies, is it not time to pause?

I do not question the rights of the ma-

jority or the capacity of the people for self-government, but I do maintain that it is incumbent upon us to regard with reverence the organic law of the land, and to obey in letter and in spirit those provisions by which it may be altered or amended. Are there to-day no rights, no privileges, which are not subject to the whim of a bare majority? Was this the purpose of the founders of this government and the makers of its Constitution? If so, what is the meaning of the Bill of Rights?

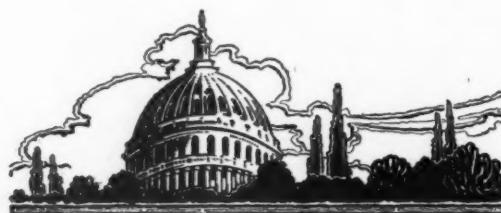
It is unfortunately true that too many of those who wish to profit by public favor are only too willing to pander to the prejudices or to play upon the passions of the populace. Few indeed are they who would rather be right than President, and who possess the moral courage to speak an unwholesome truth. It is peculiarly appropriate for that reason, that these remarks should be addressed to the bar of this commonwealth. You share with officials an interest in public affairs. Your life has been spent in a laborious analysis of the laws and customs of your country, and it can be said to the credit of the bar that, in the midst of conflicting passions and popular excesses, you have preserved your equanimity and have dared, when the common weal demanded, to speak without hesitancy or equivocation.

The same learned philosopher and economist to whom I have just referred pays a deserved tribute to the bar of this country:

In visiting the Americans and in studying their laws, we perceive that the authority they have intrusted to members of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the

excesses of democracy. . . . I am not unacquainted with the defects which are inherent in the character of that body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained, and I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people. . . . In America there are no nobles or men of letters, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated circle of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar. . . . The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself to all the movements of the social body; but this party extends over the whole community, and it penetrates into all classes of society; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes.

The flag has for all of us a new significance and a new beauty. These institutions for which our fathers labored and died, and for which our gallant sons today are prepared to make the same sacrifice, are peculiarly precious. Let them be preserved by your wisdom as by their valor. May the Constitution of my country and the liberties of its citizens prove the heritage of our children and our children's children, secure alike from the ambition of tyrants and the excesses of the multitude, and may it find a double security in the valor of its sons and in the justice, wisdom, and moderation of its people.



# *Editorial Comment*



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## *Effect of War on Foreign Insurance Companies*

THE question of the effect of war on policies of insurance is, in view of the fact that a considerable amount of insurance in this country is underwritten by foreign companies, one of considerable potential importance. It seems, states the annotator of this subject in L.R.A.1917C, 671, that such foreign companies, in view of their manner of doing business and of their compliance with the statutory requirements commonly imposed, are to be regarded as having acquired a commercial domicil in the country in which they do business,

and are not to be considered as having the status of alien enemies in respect of the business so transacted.

So it was held in *Ingle v. Mannheim Continental Ins. Co.* [1915] K. B. 227, 112 L. T. N. S. 510, 59 Sol. Jo. 59, 31 Times L. R. 41, 84 L. J. K. B. N. S. 491, [1914] W. N. 406, that a German insurance company whose head office was in Germany, but which carried on business in England through local agents, who accepted and settled risks and issued policies for the company, and which had complied with the statutory requirements imposed upon foreign corporations establishing a place of business within the United Kingdom, was not, in respect of business so transacted, in the position of an alien enemy, the court saying: "In the case of individuals and at common law the question whether a man is to be treated as an alien enemy for the purpose of his contracts, rights of suit, and the like, does not depend upon his nationality, or even upon his true domicil, but whether he carries on business in this country or not. If he does, it is not illegal, even during war, to have business dealings with him in this country in respect of the business which he carries on here. He is not, in respect of that business, divided by the war line, but has what is sometimes called a commercial domicil here. The same thing is true of companies whose head office is in Germany, but which have a branch office here, in respect of business transactions with such branch office."

Although there is a decision of minor importance to the contrary (*Tait v. New York L. Ins. Co.* (1873) 1 Flipp. 288, Fed. Cas. No. 13,726), the prevalent view is that the relation between a person insured and other members of an incorporated mutual insurance company is not such a relation of partnership as requires the application to it of the rule that a war dissolves a contract of commercial partnership between enemies. *Hamilton v. Mutual L. Ins. Co.* (1871)

9 Blatchf. 234, Fed. Cas. No. 5,896; Cohen v. New York Mut. L. Ins. Co. (1872) 50 N. Y. 610, 10 Am. Rep. 522; Mutual Ben. L. Ins. Co. v. Hillyard (1874) 37 N. J. L. 444, 18 Am. Rep. 741.

### **Professional Employment to Secure Exemption from Army Draft**

THE Committee on Professional Ethics of the New York County Lawyers Association has made the following answer to the subjoined inquiry:

#### **Question No. 149.**

I have lately been consulted by a man who has for thirty years and upwards been a client of this office. He was seeking to secure for his son exemption from military service under the so-called Selective Draft Law. The claims for exemption were of two kinds, one being a matter for the local board in the first instance with right of appeal to the district board; the other being a matter within the original jurisdiction of the district board. It seemed necessary to supplement by affidavits the official forms issued by the respective boards. No official forms were prescribed for such affidavits.

The employment came to me unsolicited; I had no reason to doubt the good faith of my client; and it seemed to me that the construction of the rather long and involved regulations, the drawing of the necessary distinctions between matters of original jurisdiction and matters of appellate jurisdiction, and the drafting of affidavits which should set forth facts and not conclusions, were tasks for a lawyer rather than for a layman. I therefore accepted the employment and performed the service. Furthermore, since my client is able and (presumably) willing to pay, I expect in due course to send him a bill for a reasonable fee.

In view of the recent utterance of another bar association on this subject, I wish to know whether in the opinion of your committee,—

(a) I have acted unprofessionally in rendering the service.

(b) It will be unprofessional to make a reasonable charge for the service.

#### **Answer No. 149.**

In the opinion of the committee the questions should be answered in the negative.

In reaching this conclusion the committee has been governed by the following considerations:

It is the duty of every citizen to obey the law, and in this hour of the nation's crisis the duty is made more immediate and more imperative only because of the crisis. The President has called upon every citizen to do his full share in uniting the nation in one supreme and effective sacrifice. In answering this call the lawyer has his duty to perform. Primarily he should assist in the enforcement of the law, and give without stint his services to that task. The exemption rules in the selective draft are part of the law. They are in the law not for any individual's private good, but for the good of the nation. Like the provisions for conscription, they are to be observed. In aiding in their observance, in the interpretation of the law, in applying the rules to the circumstances of particular cases so that the law and the facts may be presented to exemption tribunals, the lawyer is merely performing that service for which he is specially qualified and commissioned. In aiding those who seek clear exposition of the law or in aiding those whose cases come before such exemption tribunals we see no ethical impropriety. We take it for granted, of course, that the lawyer will be mindful of the obligations imposed upon him upon these occasions, as upon all others; he will not fail to speak the truth, to defend the weak, to uphold the law, and to see that no injustice is done or error made in the administration of the law. We take it for granted, also, that he will not consciously lend himself to the aid of the slacker or the shirker, either with or without pay, nor solicit employment from those seeking exemption. His services should be available only to those who really need his assistance and advice either in determining their rights or their duties under the statute and rules, or in

presenting their situation to the proper tribunal.

So far as the matter of compensation for services of this character is concerned, we think that this must be determined by the lawyer individually in each particular case, and that if the lawyer is disposed to give his services gratuitously, he is free to do so as he would in any case justifying gratuitous service.

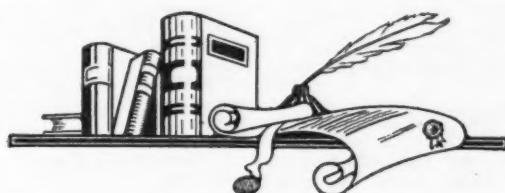
### *Trailing by Bloodhounds*

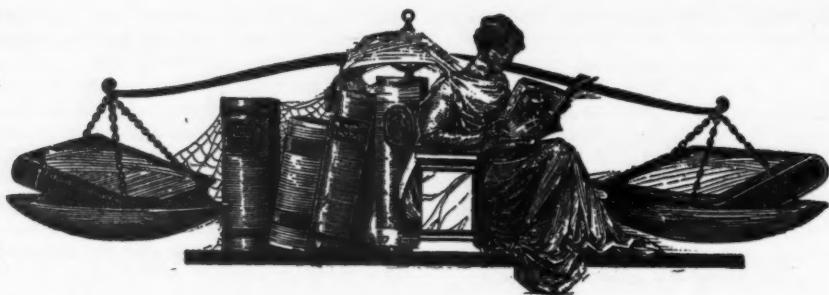
TRAILING by bloodhounds is held not admissible as evidence of guilt in the Indiana case of *Ruse v. State*, 115 N. E. 778, where it is stated that when it is considered that the use of bloodhounds, even under the most favorable condition, is attended with some degree of uncertainty which may readily lead to the conviction or accusation of innocent persons, and that at best evidence as to their conduct in following a supposed trail is properly not of great probative value, it follows that both reason and instinct condemn such evidence, and courts should be too jealous of the life and liberty of human beings to permit its reception in a criminal case as proof of guilt.

In reaching this conclusion the *Ruse Case* approves of the doctrine of *People v. Pfanschmidt* (1914) 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171 (homicide), where with respect to the admissibility of such evidence the court says: "We have reached the conclusion that testimony as to the trailing of either a man or an animal by a bloodhound should never be admitted in evidence in

any case. A bloodhound may be used to track down a known fugitive from justice. If the dog in fact takes up and follows the trail of a known fugitive and finds him, or aids his pursuers to find him, there can be no mistake as to whether or not he is the party sought. His guilt or innocence of a given crime, however, should be established by other evidence. Neither court nor jury can have any means of knowing why the dog does this thing or another in following in one direction instead of another; that must be left to his instinct, without knowing upon what it is based. The information obtainable on this subject, scientific, legal, or otherwise, is not of such a character as to furnish any satisfactory basis or reason for the admission of this class of evidence. We agree fully with the statement in *Brott v. State* (1903) 70 Neb. 395, 63 L.R.A. 789, 97 N. W. 593, that the conclusions of the bloodhound are generally too unreliable to be accepted as evidence in either civil or criminal cases." The admission of this evidence by the trial court was reversible error."

While emphasizing the necessity of caution in receiving and weighing this kind of evidence, and insisting upon a proper foundation for it, the majority of the recent cases collected in L.R.A. 1917E, 726, as well as the earlier ones presented in 42 L.R.A. 432, and 35 L.R.A. (N.S.) 870, sustain the view that the evidence of trailing by bloodhounds is admissible in a proper case, though the contrary view has now received the additional support of the Illinois and Indiana supreme courts.





## New Books and Periodicals

In science read by preference the newest works;  
in literature, the oldest.—*Bulwer-Lytton.*

**"Joseph H. Choate."** By Theron G. Strong. (Dodd, Mead, & Co., New York.) \$3.00 net. This is an appreciative study of Joseph H. Choate, from the able pen of one who enjoyed a long acquaintance with him and who had access to much valuable material in the form of scrapbooks and written reminiscences.

The author has divided his book into four parts, the titles of which are, "The New Engander," "The New Yorker," "The Lawyer," and "The Ambassador." He recounts Mr. Choate's activities in public service; his most notable achievements in important cases; his appearances as a gifted orator advocating worthy civic causes; his enlivening wit and enlightening wisdom at important social and philanthropic functions; and his valuable service in diplomacy, cultivating friendly international relations by means of numerous brilliant and charming addresses during his career as ambassador at the Court of St. James.

The work is of extraordinary interest and a fitting memorial of one of the greatest of American lawyers.

**"Business Law for Engineers."** By C. Frank Allen. (McGraw-Hill Book Co., Inc. 239 West 39th St., New York.) \$3.00 net.

The author of this work is a member of the Massachusetts Bar, of the American Society of Civil Engineers, and of the American Railway Engineering Association. He was formerly professor of railroad engineering in the Massachusetts Institute of Technology. His experience as a practising lawyer and in engineering has well qualified him to prepare a book of especial value to engineers. The purpose of the work, as stated by the author, is not to make "every man his own lawyer," but rather to give the engineer a sufficient understanding of important fundamental features of law, so that he may have some idea of when or how to act himself and when to seek expert advice, as well as to enlarge his horizon and perhaps encourage him to further study of law."

The first part of the work deals with Elements of Law for Engineers; and the second part, with Contract Letting. Many valuable contract forms are included in the volume.

**Fletcher, Cyclopedie of Corporation Law.** 8 volumes, 1917. \$60.00.

**Sutherland, Code Pleading and Practice Supplement.** 1 volume, 1917. \$7.50.

**Taylor, Due Process of Law.** 1 volume, 1917. \$9.00.

## Recent Articles of Interest to Lawyers

### Appeal and Error.

"Methods of Work in Courts of Review."—12 Illinois Law Review, 231.

"Preparation and Presentation of Cases in Courts of Review."—12 Illinois Law Review, 147.

### Attorneys.

"Efficiency in Law Office Organization."—28 American Legal News, No. 6, p. 5.

"How a Young Lawyer Can Attain Success."—28 American Legal News, No. 6, p. 19.

"The Lawyer and the Public."—28 American Legal News, No. 6, p. 11.

### Banks.

"Acceptances under the Federal Reserve Act."—34 The Banking Law Journal, 725.

"Modern Banking and Trust Company Methods."—34 The Banking Law Journal, 739.

"The Reserves Situation in the Federal Reserve System."—7 The American Economic Review, 509.

### Biography.

"Thomas Addis Emmet."—24 Case and Comment, 461.

### Carriers.

"Comments upon Development of the Last Five Years in the Law of Carriers of Goods

in Interstate Commerce—Part 1—Decisions Prior to the Carmack Amendment.”—85 Central Law Journal, 316.

“The Law of Common Carriers—The Responsibility of the Crown when Acting as a Common Carrier.”—53 Canada Law Journal, 281.

“Taxicabs as Common Carriers.”—12 Bench and Bar, 192.  
Collections.

“Increase of Collection Rates.”—28 The American Legal News, No. 10, pp. 8, 9.

“The Best Way to Make Collections by Mail.”—28 American Legal News, No. 9, p. 19.

#### Commerce.

“Comments upon Developments of the Last Five Years in the Law of Carriers of Goods in Interstate Commerce—Part 1—Decisions Prior to the Carmack Amendment.”—85 Central Law Journal, 316.

#### Conservation.

“Conservation and the Police Power.”—12 Illinois Law Review, 162.

#### Constitutional Law.

“Child Labor.”—24 Case and Comment, 486.  
“Private Rights and Administrative Discretion.”—28 American Legal News, No. 8, p. 5.

“The Dartmouth College Paralogism.”—22 Dickinson Law Review, 1.

#### Contracts.

“Emergency Government Contracts.”—24 Case and Comment, 437.

#### Corporations.

“Corporate Organization.”—28 American Legal News, No. 9, p. 5.

#### Courts.

“Court Decisions and the Common Law.”—17 Columbia Law Review, 593.

#### Courts-martial.

“Military Courts.”—28 American Legal News, No. 9, p. 22.

#### Credit.

“Why the Credit System? Its Development.”—28 American Legal News, No. 6, p. 27.

#### Criminal Law.

“Why the United States Leads the World in the Relative Proportion of Murders, Lynchings, and Other Felonies.”—85 Central Law Journal, 299.

“The Necessity for Medical Examination of Prisoners at the Time of Trial.”—24 Case and Comment, 482.

#### Damages.

“Damages for Breach of Charterparty.”—17 Columbia Law Review, 608.

#### Evidence.

“Judicial Notice in The Law of Illinois.”—12 Illinois Law Review, 260.

“The Handwriting Expert and his Work.”—10 The Lawyer and Banker, 290.

#### Flag.

“The Flag Laws.”—12 Bench and Bar, 210.

#### Incompetent Persons.

“Cyclonic Brain Storms.”—34 The Medico-Legal Journal, 1.

#### Insurance.

See “Title Insurance.”

#### International Law.

“Some Aspects of the Hague Conventions.”—24 Case and Comment, 453.

#### Juvenile Courts.

“The Functions of the Juvenile Court.”—24 Case and Comment, 449.

#### Law and Jurisprudence.

“Commerce and Legal Progress.”—28 The American Legal News, No. 10, p. 19.

“The Philosophy of State Legislation.”—12 Illinois Law Review, 173.

#### Martial Law.

“Military Jurisdiction over Spies and Sympathizers.”—21 Law Notes, 105.

#### Master and Servant.

“Fall River Sliding Scale Experiment.”—7 The American Economic Review, 530.

#### Mercantile Agencies.

“The Mercantile Agency.”—28 American Legal News, No. 9, p. 9.

#### Municipal Corporations.

“City Planning: What it Means and Includes.”—1 New Jersey Municipalities, 10.

“New Jersey's New Municipal Budget Act.”—1 New Jersey Municipalities, 5.

#### Negligence.

“Liability of Householders for Injuries to Invitees.”—21 Law Notes, 108.

“Presence of Passenger on Platform as Contributory Negligence.”—12 Bench and Bar, 198.

“What is Negligence.”—21 Law Notes, 129.

#### Public Service Corporation.

“The Federal Valuation Act.”—17 Columbia Law Review, 585.

“Early Regulation of Public Service Corporations.”—7 The American Economic Review, 569.

“Municipal Ownership—The Salvation of our Cities.”—1 New Jersey Municipalities, 13.

#### Records and Recording Laws.

“Application of the Torrens System to our American Land Titles.”—10 The Lawyer and Banker, 282.

#### Rural Credits.

“Unconstitutional Features of the Federal Farm Loan Act.”—10 The Lawyer and Banker, 302.

#### Shipping.

“The War and Trans-Pacific Shipping.”—7 The American Economic Review, 553.

#### Title Insurance.

“Progress in Title Matters.”—10 The Lawyer and Banker, 297.

#### Treaties.

“The Effect of War on Treaties.”—21 Law Notes, 126.

#### Uniform Legislation.

“Uniformity of Laws in the Western Provinces.”—53 Canada Law Journal, 289.

#### War.

“War and the Discharge of Contracts.”—53 Canada Law Journal, 254.

“English Cities in War Times.”—6 National Municipal Review, 557.

#### Wills.

“The Right of Testamentary Devise.”—28 American Legal News, No. 9, p. 11.

#### Witnesses.

“A Remedy for the Evils of Expert Testimony.”—24 Case and Comment, 477.



## Among the New Decisions

Aristotle used to define justice as "a virtue of the soul distributing that which each person deserved."—Diogenes Laertius.

**Arrest — without warrant — assault on officer.** That a police officer may arrest without warrant one who has made a violent assault upon him and stolen and retained his mace is held in the case of United States Bank & T. Co. v. Switchmen's Union, 256 Pa. 228, 100 Atl. 808, L.R.A.1917E, 311.

**Bank — collection of collateral — liability.** A bank holding a note as collateral security is held liable to the owner of the note for the negligence of its correspondents to whom it sends the note for collection, in Farmers Nat. Bank v. Nelson, 255 Pa. 455, 100 Atl. 136, annotated in L.R.A.1917E, 506, where it is said:

There is a difference of opinion as to the liability of the collecting bank for default of its correspondent. According to one line of authorities, a bank taking paper for collection is not liable if it has used proper care in the selection of its correspondent. This rule, the court in the foregoing case holds inapplicable in the case of collection by a bank of paper held as collateral.

It seems clear that whatever the duty of a bank may be by virtue of its position as the holder of the paper as pledgee, the rule as to the duty of the bank as a collecting agency is inapplicable except as it may be invoked by analogy. It will be observed that the court in the above decision, after deciding that the case was not governed by the rule applicable to collecting banks, gave but little consideration to the independent question as to the responsibility of a pledgee for the negligence of

the agents selected to make the collection. There is comparatively little authority on that question.

**Boycott — to compel enforcement of union rules on members.** That a boycott by members of a labor union of a retail business in order to compel its owner to coerce his employees to pay back dues to the union or to discharge them is unlawful, is held in Harvey v. Chapman, 226 Mass. 191, 115 N. E. 389, accompanied in L.R.A.1917E, 389, by supplemental annotation on the right of a labor union to notify a person not to deal with certain individuals.

**Constitutional law — Bulk Sales Law — liberty of contract.** A statute forbidding sales of stocks of goods in bulk without notice to creditors is held not void as an arbitrary and purposeless restriction upon the liberty of contracts in Klein v. Maravelas, 219 N. Y. 383, 114 N. E. 809, L.R.A.1917E, 549.

**Contempt — place committed — effect.** A contempt being an offense against the dignity and authority of the particular court to which the affront was offered, if the court has jurisdiction of the parties and the subject-matter out of which the contempt grows, it is held in the Oklahoma case of Farmers State Bank v. State, 164 Pac. 132, that it has

jurisdiction to try and punish the contemnor, regardless of where or in what state the acts constituting the contempt may have been committed.

The power to punish contempt committed out of the state is treated in the note accompanying the foregoing decision in L.R.A.1917E, 551.

**Corporation — liability for injury by dog.** It is hardly to be expected that the entire power of a brewing corporation will be invoked, or that even a resolution of its board of directors will be considered necessary, to authorize the keeping of a dog in its bottling plant, whether to kill rats or as a mascot or source of amusement to its employees; but those who are vested with the corporate authority are held bound in the Louisiana case of *Serio v. American Brewing Co.* 74 So. 998, to know that a dog so kept, with the knowledge and approval of the agent whom they place in charge of the plant, is a dangerous animal, which threatens injury to innocent people, and the fact that they choose to close their eyes to that condition is not a good defense to an action in damage by a person who, without fault on his part, has been bitten by the dog.

Supplemental annotation on the question as to who is a keeper or harborer of dogs is appended to this case in L.R.A. 1917E, 520.

**Corporation — transfer of stock on order of executor — liability.** A corporation which, at the instance of an executor, transfers stock standing in the name of testator to persons having a mere defeasible estate, and then permits them to transfer absolutely to strangers so that it is lost to the remaindermen, is held liable to them for its value, in the North Carolina case of *Baker v. Atlantic Coast Line R. Co.* 92 S. E. 170, L.R.A.1917E, 266, since the corporation is charged with notice of the contents of the will and the extent of the executor's authority.

**Damages — condemnation of toll road — allowance for loss of tolls on automobiles.** A toll road company chartered before the invention of automobiles and given the right to exact tolls for

horse-drawn vehicles, having no right to take tolls from automobiles, is held entitled to no allowance in the Vermont case of *Re Highway of Peru*, 100 Atl. 679, for the loss of such right upon condemnation of the road for a free public highway.

The right to take toll for the use of a road or a bridge by an automobile is treated in the note appended to this case in L.R.A.1917E, 559.

**Damages — liquidated — bond to secure contract.** The commissioner of public works of the city of St. Paul, pursuant to the order of the common council, published a notice inviting bids for furnishing the city with 345 tons of asphalt for resurfacing certain streets. The notice stated that a bond for 20 per cent of the bids for a certified check for 10 per cent thereof must accompany each bid "as a surety for the making and execution of a contract." This language, it is held in the Minnesota case of *Barber Asphalt Paving Co. v. St. Paul*, 162 N. W. 470, does not indicate an intention to regard the bond or check as liquidated damages, nor can that construction be placed upon it when the situation of the parties and the surrounding circumstances are given due weight.

Supplemental annotation on the question whether a sum deposited to secure performance of a contract should be regarded as a penalty or liquidated damages accompanies the foregoing decision in L.R.A.1917E, 370.

**Discrimination — rates — emergency — surplus water.** Water utilities in the state of California were authorized in the case of *Re Delivery of Surplus Water*, P.U.R.1917E, 399, to deliver surplus water free or at reduced rates for irrigation of additional lands during the emergency created by the war, without being required to deliver water to all consumers free or at reduced rates.

**Discrimination — service — rates — mutual telephone — stockholders.** A mutual telephone company cannot distinguish between stockholders and non-stockholders in its methods of extension of service nor in its charges for service,

it is held in the Wisconsin case of *Re Tamarack Teleph. Co.* P.U.R.1917E, 540.

**Divorce — domicil — jurisdiction.** Legal residence or domicil in this state of one whose domicil of origin is there, or who may have established in the state a domicil by choice, is held sufficient in the Florida case of *Warren v. Warren*, 75 So. 35, L.R.A.1917E, 490, to give the court jurisdiction of the subject-matter in a cause involving the duties and obligations arising out of his or her marital status with another; and temporary absence from the state even for a long period of years is not sufficient to devest the court of jurisdiction.

**Eminent domain — negligent injury to property — compensation.** Injury to a house by the slipping of earth because of the negligent construction, by municipal employees, of a sewer trench in the adjoining street, is held within a constitutional provision making municipal corporations liable to make compensation for property taken, injured, or destroyed by them, in *O'Gara v. Dayton*, 175 Ky. 395, 194 S. W. 380, annotated in L.R.A. 1917E, 574.

The rule adopted in this case, that the impairment of lateral support of property not actually taken affords ground for the recovery of damages, under constitutional provisions of the nature of those under consideration, is generally adopted.

**Evidence — contest of will — effect of probate.** If, upon proceedings to contest a will, there is evidence against testator's capacity and the due and proper execution of the instrument, the fact that the instrument has been admitted to probate, it is held in the Indiana case of *Kilgore v. Gannon*, 114 N. E. 446, cannot be considered in support thereof.

The effect of the probate of a will as evidence is considered in the annotation following this case in L.R.A.1917E, 530.

**Evidence — proximate cause — res ipsa loquitur.** In case a lodger perishes in a fire in a lodging house not equipped with fire escapes as required by statute, and evidence is lacking upon the question whether or not the noncompliance with the statute was the proximate cause

of the death, the doctrine *res ipsa loquitur*, it is held in *Burt v. Nichols*, 264 Mo. 1, 173 S. W. 681, L.R.A.1917E, 250, may be invoked to take the question to the jury.

**Executors and administrators — revocation of letters.** If letters of administration be issued to a person not entitled thereto, they are voidable and may be revoked, but are not void *ab initio*. They are held effective in the Minnesota case of *Re Price*, 162 N. W. 454, L.R.A. 1917E, 544, to the extent necessary to protect those who in good faith have acted in reliance upon them.

**Highway — obstruction by street car.** The fire department of Oklahoma City was by ordinance given the right of way in passing to a fire, and defendant street railway company was required by ordinance to stop its street cars in case of fire, 300 feet from the street intersection on which fire apparatus would cross its track. Plaintiff was riding on a truck to a fire, driven by another. Proper warnings were being given of the approach of the truck, and plaintiff and the others riding upon said truck, it is held in the Oklahoma case of *Oklahoma R. Co. v. Thomas*, 164 Pac. 120, were justified in assuming that defendant's car would be stopped as required by ordinance.

Supplemental annotation as to the liability of a street railway company for injuries caused by a collision with fire apparatus accompanies this decision in L.R.A.1917E, 405.

**Highway — obstruction by wires — duty.** It is held to be the duty of an electric company to anticipate the moving of buildings of greater height than the wires maintained by it and to take precautions to protect persons liable to be on such structures from danger of coming in contact with its wires, in *Logan v. Empire District Electric Co.* 99 Kan. 381, 161 Pac. 659, L.R.A.1917E, 258.

**Husband and wife — wife's recovery for services.** Compensation for services rendered by a wife outside of the home of her husband, with whom she is living, such services not being in the discharge

of her household or domestic duties, and not in interference therewith, is held recoverable in an action therefor in her own name and for her own use, in *Bechtol v. Ewing*, 89 Ohio St. 53, 105 N. E. 72, which is accompanied by an extensive note in L.R.A.1917E, 279.

**Injunction — against picketing.** That an injunction lies to restrain members of a labor union from picketing a private business to force its owner to coerce his employees to pay dues to the union or to discharge them is held in *Harvey v. Chapman*, 226 Mass. 191, 115 N. E. 304, accompanied in L.R.A.1917E, 389, by supplemental annotation on the right of a labor union to notify a person not to deal with certain individuals.

**Injunction — threat — boycott.** A publication to the effect that patrons of a concern alleged to be unfair to union labor will themselves be regarded as so unfair, and disciplined if members of unions, or boycotted by union labor, is held not an unlawful threat which can be enjoined, in the Montana case of *Empire Theatre Co. v. Cloke*, 163 Pac. 107, L.R.A.1917E, 383.

**Insurance — death in resisting officer — improper conduct.** Resisting a lawful arrest and violently assaulting the officer attempting to make it, which results in the accidental discharge of a pistol in possession of the officer, and death of the assailant, is held in *United States Bank & T. Co. v. Switchmen's Union*, 256 Pa. 228, 100 Atl. 808, L.R.A.1917E, 311, to be within a condition relieving a mutual benefit association from liability for death caused by criminal act on the part of insured or brought on by improper conduct.

**Insurance — fraud in procuring.** The defense of fraud in procuring an insurance policy is held precluded by a clause making it contestable from date except for nonpayment of premiums, in *Duvall v. National L. Ins. Co.* 28 Idaho, 356, 154 Pac. 632, annotated in L.R.A.1917E, 333.

**Insurance — misrepresentation — increase of risk.** False denial of rejection

by another company for life insurance is held to be within a statute avoiding the policy for misrepresentations which increase the risk of loss, in *Mutual L. Ins. Co. v. Dibrell*, 137 Tenn. 528, 194 S. W. 581, annotated in L.R.A.1917E, 554, where it is observed:

The court in this case held that the phrase, "increase the risk of loss," as used in the statute which provided "that no written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of [life] insurance, . . . by the assured or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increase the risk of loss," included the risk of loss involved in the issuance of the policy, and did not require that the matter misrepresented should be such as contributed to the hazard after the issuance of the policy in order to avoid it, and that uncontradicted evidence showing a false denial of the insured's rejection by other companies entitled the insurer to peremptory instructions in its favor.

This decision seems sound, and is of particular value as there appears to be a want of other authority upon the question.

**Insurance — mortgage clause — pledge of secured notes — effect.** The mere pledge of collateral for a debt by the mortgagee of the secured notes will not, it is held in the Mississippi case of *Mechanics & T. Ins. Co. v. Boyce*, 74 So. 821, annotated in L.R.A.1917E, 328, defeat his right to recover under a mortgage clause in a policy insuring the mortgaged property, because of a clause in the policy forbidding any change in the interest, title, or possession of the subject of insurance.

**Insurance — sale for taxes — effect.** A sale of insured property for taxes, it is held in the Mississippi case of *Mechanics & T. Ins. Co. v. Boyce*, 74 So. 821, L.R.A.1917E, 328, is not, until the redemption period expires, within the meaning of the clause avoiding the policy in case of change of title to the property.

**Internal revenue — deduction of increased property value from income.** For the purpose of ascertaining the taxable income of a corporation under the Federal Income Tax Law from the manufacturing of lumber from timber cut

from land belonging to it, it is held in *Mitchell Bros. Co. v. Doyle*, 149 C. C. A. 106, 235 Fed. 686, annotated in L.R.A. 1917E, 568, that the value of the stumpage at the beginning of the year should be deducted, although it had been carried on the books of the corporation at the price paid for it before the act went into effect, which was less than its value at the beginning of the tax period.

**Landlord and tenant — relation — creation.** Where one, the owner of land, grants the use, occupation, and possession of such land to another for a year or a term of years for a stipulated share of the crop each year for the use of said land, and such contract contains a provision "that the title and possession of all crops or grain so raised on said land during such time of such contract shall be and remain in the landlord until division thereof," it is held in *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355, 162 N. W. 543, L.R.A.1917E, 298, that such contract creates the relation of landlord and tenant, and not the relation of master and servant; that the contract is one of tenancy, and not one of hiring.

**Landlord and tenant — right to mortgage crop.** A tenant of lands upon shares, it is held in *Minneapolis Iron Store Co. v. Branum*, 36 N. D. 355, 162 N. W. 543, L.R.A.1917E, 298, may give a chattel mortgage upon his share of the crops to be grown upon such land for such time as provided in accordance with the law, and such chattel mortgage will attach to such share of such crops when such crops come into existence, and such crops will, for the purpose of the attaching of the chattel mortgage lien, be deemed to be in existence, at least as soon as such crops appear above ground and appear to the natural senses to be in existence.

**Libel — comment on acts of public citizen — privilege.** Newspaper comment upon the acts of a prominent citizen of the town where it is published, in favoring a rival town in the attempt to secure from the general government something which general opinion regards as a benefit to the town which receives it, is

held privileged in *Flanagan v. Nicholson Pub. Co.* 137 La. 588, 68 So. 964, L.R.A. 1917E, 510, and therefore no action lies by an international officer of a labor union who at the national Capital used his influence to enable a rival city to secure an exposition in preference to his home town, against a local newspaper which refers to him as a traitor, a fellow under the influence of the railroad system which formerly employed him, who should be driven out of town and given the cold shoulder by all self-respecting citizens, and represents a citizen as saying that he would pull him as a dangerous and suspicious character.

A careful search has failed to disclose any similar case, but it would seem that where a citizen comes out in active opposition to the procurement of something of great public interest like an exposition, which is considered a benefit to the community in which it is situated, and thus puts himself before the public, he consents to such fair and reasonable comment upon and criticism of his conduct as the facts of the case warrant. And to this extent it seems the doctrine of privilege should apply.

**License — golf course — police power.** That a golf course maintained by an individual for the use of all who pay a fee for entrance thereto is not within the police power so as to empower a municipal corporation to require a license for its maintenance is held in *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, annotated in L.R.A.1917E, 314.

Several cases have discussed the question whether a particular game or amusement is a proper subject for the exercise of the police power. Pool and billiards, horse racing, public dancing, and moving picture shows have been held to be proper subjects for police regulation.

**Lien — maritime — agreement — priority over mortgage.** The owner of several vessels, it is held in the *Astor Trust Co. v. White*, 241 Fed. 57, cannot by agreement fix a maritime lien upon each for supplies furnished for the use of any, which will bind one vessel as against a prior recorded mortgage for supplies furnished for and used by the others.

Whether two or more vessels may be subjected to a joint maritime lien is considered in the note which accompanies this decision in L.R.A.1917E, 526.

**Limitation of actions — Federal Employers' Liability Act — fraudulent representations.** Fraudulent representations which prevent the bringing of an action under the Federal Employers' Liability Act within the time prescribed thereby, it is held in the Michigan case of *Bement v. Grand Rapids & I. R. Co.* 160 N. W. 424, L.R.A.1917E, 322, will not extend the time for commencing the action.

**Limitation of actions — stockholders' liability — when runs.** The Statute of Limitations, it is held in *Kirschler v. Wainwright*, 255 Pa. 525, 100 Atl. 484, begins to run upon the liability imposed by a statute declaring that stockholders shall be individually liable for all debts and liabilities of the corporation in double the amount of stock held by them only from the time the deficiency of assets is ascertained and assessment authorized, although that is subsequent to the decree of insolvency and appointment of a receiver.

Supplemental annotation on accrual of right of action to put Statute of Limitations into operation as to stockholders' liability for corporate debts accompanies the foregoing decision in L.R.A.1917E, 393.

**Mandamus — to compel rescission of act.** Mandamus, it is held in the Missouri case of *State ex rel. Hagerman v. Drabelle*, 191 S. W. 691, will not lie to compel election commissioners to rescind the acceptance of a certificate of nomination to office and desist from placing the candidate's name on the ballot, although there is no vacancy in the office, if they act in the honest belief that such vacancy exists, and without intent to disobey the law.

Mandamus as a proper remedy to enforce duties with respect to nominations is treated in the note appended to the foregoing case in L.R.A.1917E, 475.

**Master and servant — application of *res ipsa loquitur*.** Where the doctrine of fellow service and assumption of risk has been abrogated by statute, the maxim *res ipsa loquitur* is held to apply between master and servant, in the Indiana case

of *Decatur v. Eady*, 115 N. E. 577, annotated in L.R.A.1917E, 242.

**Master and servant — automobile — adult daughter driving — liability of father.** An adult daughter who is a competent automobile driver, in taking a car in which her father has a partnership interest for business purposes, with his implied consent, for a pleasure trip on which her mother accompanies her, is held not to be the servant of her father, in *Woods v. Clements*, 113 Miss. 720, 74 So. 422, L.R.A.1917E, 357, so as to render him liable for an injury inflicted by her negligence upon a traveler on the highway.

**Master and servant — Federal Employers' Liability Act — crossing watchman.** A watchman at a highway crossing employed by a railroad company engaged in both interstate and intrastate traffic is held engaged in interstate commerce, in the California case of *Southern P. Co. v. Industrial Acci. Commission*, 161 Pac. 1139, L.R.A.1917E, 262, so that liability for his injury while in the performance of his duties is governed by the Federal Employers' Liability Act, although the injury is caused by an intra-state train.

**Money received — altered position.** In an action to recover for money had and received under a mutual mistake, defendant is held not to be liable in the Minnesota case of *Grand Lodge, A. O. U. W. v. Towne*, 161 N. W. 403, annotated in L.R.A.1917E, 344, if he has irrevocably altered his position to his loss in reliance upon the payment. The evidence in this case, however, is held not to show that defendant by reason of or in reliance on the payment lost an opportunity to recover from the party guilty of the fraud, or that his position has been altered to his damage.

**Municipal corporation — limitation of tax rate — provision for judgments.** A municipal corporation, it is held in *Menar v. Sanders*, 169 Ky. 285, 183 S. W. 949, L.R.A.1917E, 422, cannot avoid levying a tax to pay a judgment recovered against it for personal injuries

due to the unsafe condition of its streets because the Constitution forbids it to incur indebtedness and limits its tax rate, and the judgment cannot be provided for without exceeding the constitutional limit.

**Negligence — propelling person against child.** The evidence in the Minnesota case of *Feeney v. Mehlänger*, 161 N. W. 220, L.R.A.1917E, 271, is held sufficient to sustain a finding of the jury that the defendant ejected a drunken man from his saloon with such force that he was thrown or fell upon a child standing on the street watching a parade, and that in ejecting him he was negligent in respect of such child; and if his negligence resulted in injury to the child, he is not relieved of liability because, as respects the drunken man, his conduct was rightful.

**Nuisance — frame garage.** A dilapidated barn constructed of pine and used as a livery barn and garage with the incidental storage of gasoline and food-stuffs is held not a public nuisance in the Alabama case of *Radney v. Ashland*, 75 So. 25, annotated in L.R.A.1917E, 366, although located near other buildings which would be endangered should it take fire, and also near a jail the lives of whose inmates would be imperiled by its burning.

In the few reported cases on the subject the attempts to have garages denounced as nuisances have failed.

**Nuisance — obstruction of street.** The carrying by one man of a banner in front of a boycotted theater when a show is to be given therein, and the causing of one or more men to stand upon and walk along the street in front of and near the theater, who state to persons desiring to enter it that it is unfair to organized labor, are held in the Montana case of *Empire Theatre Co. v. Cloke*, 163 Pac. 107, L.R.A.1917E, 383, not to be within a statute making it a nuisance unlawfully to obstruct the free passage or use in the customary manner of any public street.

**Parent and child — right to custody — selfishness.** That utter selfishness

alone on the part of a parent will not deprive it of a right to the custody of its child is held in the Iowa case of *Risting v. Sparboe*, 162 N. W. 592, L.R.A. 1917E, 318, which further holds that a father's desire to remove his infant daughter from the home of one maternal aunt to that of another merely to suit his convenience in visiting her will not prevent the consideration of what is for her best interest as a determining factor.

**Proximate cause — injury to one alighting from street car — passing automobile.** The driving of an automobile past a standing street car contrary to statute is held in *Frankel v. Norris*, 252 Pa. 14, 97 Atl. 104, to be the proximate cause of injury to an alighting passenger by the pushing against him of another passenger hit by the automobile, although the latter did not look to see if the automobile was approaching.

This holding is sustained by the cases passing upon the question, which are gathered in the note appended to the foregoing decision in L.R.A.1917E, 272.

**Rates — meters — short-period service.** The Illinois Commission, although favoring general meter service whenever practicable, will not require it in the case of consumers receiving service during fourteen days only of each year, it is held in the case of *Re Lincoln Water & Light Co.* P.U.R.1917E, 102.

**Rates — seasonal service.** It is reasonable that an applicant for seasonal service should be required to contract for a definite length of season during each year of the life of his contract, it is held in the California case of *Re San Joaquin Light & P. Corp.* P.U.R.1917E, 411, but he should not be required to forecast definitely the date when he desires such season to start.

**Release — rescission — false representations.** Where a person who receives injuries while a passenger upon a railway train is induced to make settlement of, and release, his cause of action against the railway company by reason of false representations of material facts made by the claim agent during the nego-

tiations of settlement and prior to the execution of the release, such settlement and release, it is held in *Clark v. Northern P. R. Co.* 36 N. D. 503, 162 N. W. 406, L.R.A.1917E, 399, may be rescinded and avoided, even though such false representations were made without knowledge of their falsity and without wrongful or fraudulent intent on the part of the claim agent.

**Schools — expenses of officers — liability of district.** Expenses incurred by the president of the board of education and the superintendent of schools, at Omaha, Nebraska, in attending a congress of school hygiene, under the authority of the board, for the purpose of securing general information on the subject of school hygiene are held not necessary expenses incurred in the performance of official duties, in the Nebraska case of *Smith v. Holovchiner*, 162 N. W. 630, annotated in L.R.A.1917E, 331, and the treasurer of the board may be enjoined from the payment of such expenses.

**Schools — limitation of indebtedness — purpose.** The purpose of § 183 of the North Dakota Constitution, in limiting the debt of certain municipalities, including school districts, to 5 per cent upon the assessed valuation of the taxable property therein, is to prevent such municipalities from improvidently contracting debts for other than ordinary current expenses of administration, and to restrict their borrowing capacity, and the word "debt," as therein employed, it is held in *Anderson v. International School Dist.* 32 N. D. 413, 156 N. W. 54, should receive a broad meaning so as to cover liabilities created under executory contracts for public improvements, although nothing is due thereunder until the same are executed in part or in whole.

Supplemental annotation as to the creation of indebtedness within the meaning of a debt limit provision is appended to this case in L.R.A.1917E, 428.

**Service — cost of repairing frozen water meters.** The cost of repairing frozen water meters should be borne by the water consumers, it is held in the

New Jersey case of *Re Hackensack Water Co.* P.U.R.1917E, 106.

**Service — jurisdiction of Commission — telephone zones — division of territory.** That the division of territory into local exchanges or zones for the purpose of furnishing telephone service should be left primarily to the judgment and experience of the utility, to be modified or corrected by the Commission only when any division affects disadvantageously and unreasonably the service to the public, is held in the Pennsylvania case of *Scribner v. Bell Teleph. Co.* P.U.R.1917E, 525.

**Service — water — purity.** That a water company whose only available supply consists of surface water fulfills its duty to its customers, so far as purity is concerned, when it treats the water in accordance with the best known methods, is held in the New Jersey case of *Re Hackensack Water Co.* P.U.R.1917E, 106.

**Tax — income — profit from sale of property.** The legislature, it is held in *State ex rel. Bundy v. Nygaard*, 163 Wis. 307, 158 N. W. 87, annotated in L.R.A. 1917E, 563, cannot, under a constitutional provision for the taxation of incomes, provide that, in case of sale at a profit of property held when the act was passed, the tax shall be assessed upon the proportional part of the profit which the time that has elapsed since the passage of the act bears to the time since the acquisition of the property, if the property has not increased in value since the act was passed.

**Trial — jury — conflict of evidence — consideration for note.** In an action brought to recover the amount due upon certain promissory notes, the defendant admitted the making and delivery of the instruments, but set up want of consideration to the knowledge of the plaintiff, as a defense. The plaintiff offered the notes in evidence and rested. The defendant and two other witnesses called by him gave testimony which, if believed, showed that the notes in suit lacked consideration to support them. No wit-

nesses were examined for the plaintiff, and, upon the conclusion of the case, the trial judge directed a verdict for the defendant. It is held in McCormack v. Williams, 88 N. J. L. 170, 95 Atl. 978, annotated in L.R.A.1917E, 535, that the notes are to be deemed *prima facie* to have been made for valuable consideration. They gave inherent evidence of validity. Because all the individual witnesses who testified gave evidence tending to show their invalidity, no matter how strong that evidence, it raised, in effect, a conflict of testimony; and conflicting testimony is always for the jury.

**Valuation — ascertainment — average prices — prevailing high prices.** That the prices of labor and materials covering a period of years should be used as a basis for valuation figures in fixing the value of a utility's property for security issue purposes, rather than the prevailing high prices, where the properties were bought during the period of normal prices and the prices were very low during a portion of their history, is held in the Nebraska case of *Re Monroe Independent Teleph. Co.* P.U.R.1917E, 471.

The report of the above case in P.U.R. is accompanied by annotation on amount of security issues.

**Valuation — ascertainment — use at time of valuation.** The value of a utility's property for municipal acquisition, it is held in the California case of *Re San Fernando*, P.U.R.1917E, 261, must be determined upon the worth of the things to be transferred under the conditions and for the purposes for which they are being utilized at the time of the valuation, and not upon the probable value of such property for some future or different use to which the purchaser may put it.

**Valuation — water rights — comparison with expense of operation by steam.** In fixing the value of a utility's plant for security-issue purposes, the value of the water power, it is held in the New Hampshire case of *Grafton County Electric Light & P. Co. v. State*, P.U.R.1917E, 345, 100 Atl. 668, cannot be determined by comparison with the expense of operation by steam.

**Workmen's compensation — accident during noon hour — course of employment.** An injury to a city employee engaged in outdoor work in inclement weather by the explosion of vapor from a gasoline can in a tool house used in connection with the work, to which he had gone for shelter whilst eating his dinner, when he struck a match to light his pipe, is held in the Michigan case of *Haller v. Lansing*, 162 N. W. 335, L.R.A.1917E, 324, to arise out of and in the course of his employment within the Workmen's Compensation Act if he violated no rule of his employer and was not aware of the presence of the vapor.

**Workmen's compensation — daily wage — how computed.** To compute the daily wages of an injured employee whose contract called for a certain number of hours per week, the weekly wage, it is held in the Maine case of *Hight v. York Mfg. Co.* 100 Atl. 9, L.R.A.1917E, 277, should, where he was employed only one-half day on Saturday, be divided by 6, and not  $\frac{5}{6}$ , under a workmen's compensation act providing that the average weekly wages shall be 300 times the wages earned on days employed when working the number of hours constituting a full working day, divided by 52.

**Workmen's compensation — fall from epilepsy — injury arising out of employment.** Death of a plumber by falling from a scaffold on which he was at work in the course of his employment, because of an epileptic seizure, is held not to arise out of his employment within the meaning of the Workmen's Compensation Act, in the Michigan case of *Van Gorder v. Packard Motor Car Co.* 162 N. W. 107, L.R.A.1917E, 522.

**Workmen's compensation — predisposition to hernia — accident as proximate cause.** That congenital predisposition to hernia does not prevent a hernia resulting from an accidental slip from being proximately caused by the accident within the meaning of the Workmen's Compensation Act is held in the Wisconsin case of *Casper Cone Co. v. Industrial Commission*, 161 N. W. 784, L.R.A.1917E, 504.

## Recent English Decisions

**Banks — check — alteration in amount — leaving blank space as negligence on part of drawer.** That one who, being asked by a confidential clerk whose integrity he had no reason to suspect, to sign a check for £2 for petty cash, did so without noticing that the amount was not inserted in writing, and that the figures were so written as to permit of alteration of the amount, was not guilty of such negligence that the loss occasioned by the act of the clerk in inserting additional figures and writing in the amount, so as to make the check one for £120 should fall on him rather than on the bank; and that the bank was not protected by the provisions of § 20 of the English Bills of Exchange Act (of which § 14 of the Uniform Negotiable Instruments Law is a substantial equivalent), that "when a bill is wanting in any material particular the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit," and that as against a holder in due course the drawer is precluded from denying the authority, or by § 9, subsec. 2, of the same act (of which § 17 (1) of the Uniform Negotiable Instruments Law is an equivalent), that "where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable," such section having no reference to a check which has never been negotiated,—is held in *Macmillan v. London Joint Stock Bank* [1917] 2 K. B. 439, in which the English authorities bearing upon the question are discussed at length.

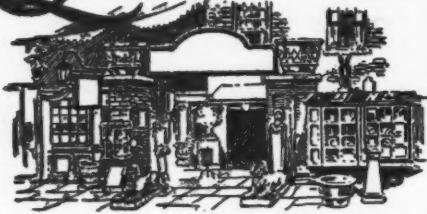
**Landlord and tenant — liability of landlord for poisoning of tenant's horse by tree growing on his premises ad-**

joining. Is a landlord who has let a farm, retaining in his own possession adjoining land on which was growing shrubbery dangerous to animals, which at the time of the demise overhung the demised property, but could not be reached by cattle or horses, and which grew during the tenancy so as to come within reach of horses, liable where the tenant's horse ate of the leaves and was poisoned? Upon this point the two judges of an English Divisional Court differed in the case of *Cheater v. Cater* [1917] 2 K. B. 516, one of them holding the landlord to be liable within the principle that one having upon his property something which, unless duly restrained, is liable to cause damage to the occupants of adjoining property, is under an absolute duty to restrain it, and the other taking the view that the landlord was not liable, upon the principle that a lessee takes the land as he finds it.

**Marine insurance — proximate cause of loss — damage to ship by running on wreck of vessel sunk by enemy submarine.** That insurance of a vessel against loss through consequences of hostilities does not cover damage caused by running upon the submerged wreck of another vessel which had been torpedoed and sunk in shallow water by an enemy submarine some hours previously, on the ground that such damage was not proximately caused by the peril insured against, the purpose of the act of hostility which was the remote cause of the loss being to sink the first vessel, and not by sinking it to damage passing vessels,—is held in *William France, Fenwick & Co. v. North of England Protecting & Indemnity Asso.* [1917] 2 K. B. 522.



# QUAINT and CURIOUS



A sheaf of gleanings culled from wayside nooks.

**Soldiers' Wills.** A strange "trench will" was offered in the London courts for probate recently:

Before going into action at Ypres Lieutenant Joseph Child wrote his will on the back of a photograph of a girl. The will consisted of one sentence: "In the event of my death I leave all my effects and money to this young lady."

The photograph was found on his body. Investigation finally established it as the likeness of his sweetheart, Miss Mary Pickles of Yorkshire.

In the Westminster Gazette appears the following account of another will:

"I was looking through a man's dossier the other day," a medical friend in khaki tells me, "when an unusual paper attracted my attention. It was inscribed outside, in Gothic characters: 'My last Will and Testament.' Inside, without preamble, was the following: '(1) My Will: I bequeath, in the event of my being killed, everything I have, and that ain't much, and it will be less by the time it gets back home, to my mother, Mrs. ——; (2) My Testament:—which mother gave me, I give to my sweetheart, Miss Daisy ——. She don't know I'm sweet on her, but I am! That's all. (Signed) ——.'

"He did not die," my friend goes on to say, "and I discharged him from the army. When he appeared before me, and when I asked him, very officially, if he had a sweetheart, he earnestly assured me that he had not. I suppose when his life was spared he weighed the girl against the Testament, and Holy Writ won."

**Primitive Men Found Guilty of Murder.** A pair of blonde Eskimos who were brought down from the shores of the Arctic, over 2,000 miles away, were recently tried at Calgary and convicted of the murder of two priests, who went into the north to civilize the tribe right after its discovery in 1910. It took two members of the mounted police three years to find the accused, during which time they covered a distance of over 6,000 miles.

This is said to be the first case of native criminals being brought down to civilization for trial. Formerly, such cases were tried summarily on the spot.

The accused were pagans, in whose moral code murder is not a crime.

Counsel for the defense said it was very strange a primitive man should be brought from the Arctic circle to Calgary to stand trial for murder, a man to whom white men were unknown prior to 1910. Could the Eskimos, between 1910 and 1913, be expected to assimilate the white man's law and differentiate between right and wrong? Stefansson had the necessary tact and good sense to make friends. Nothing happened to Hornby. If anything did happen to a white man in that country it must be because he runs contrary to the customs and transgresses some law, in this way making the Eskimos afraid. It must be remembered that they first fear the spirits, and next strangers.

Counsel further urged that instead of charging Sinnisialk and Uluksuk with murder, they should be treated like young children or imbeciles who are incapable

of crime. Explorers take the chance in offending these people, and, if they do offend, must take the consequences, as primitive men are not responsible for their actions.

He said that justifiable homicides or self-defense held good when a man reasonably believed he was going to be killed or was in danger of bodily harm. The evidence showed that the Eskimos were justified in defending themselves, even up to the point of taking the priests' lives, as they were laboring under the impression the priests were going to kill them.

The Crown prosecutor pointed out that acquittal in this case was an impossible verdict, and if rendered would allow the Eskimos to think they could murder with impunity.

In summing up the evidence the presiding judge said the jury must not lose sight of the fact that the Eskimos, in spite of their untutored state, were Canadians, and as such amenable to Canadian law. It might seem cruel that a man be punished for doing something he didn't know was wrong, but all citizens are equal before the law.

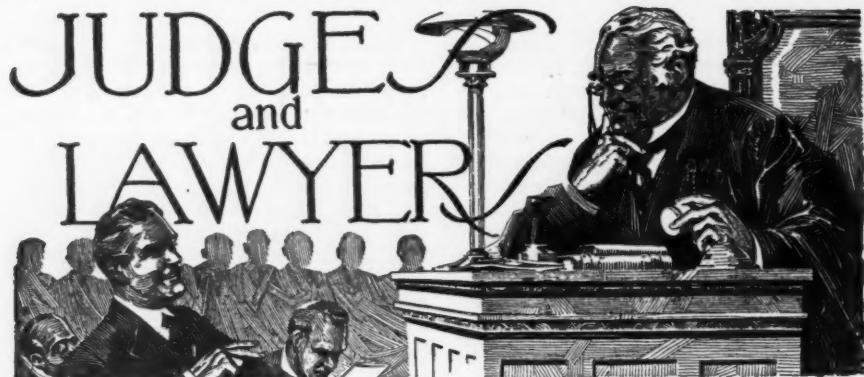
His lordship said that in the present case the statements of the prisoners admitted the murder, and the jury must decide whether it was culpable or non-culpable.

The verdict returned by the jury was as follows: "We find the prisoners, Sinnisiak and Uluksuk guilty of murder, with the strongest possible recommendation to mercy that the jury can make."

Before dismissing them, his lordship thanked the jurymen and said: "You have performed a very unpleasant task in a commendable manner and have rendered the only verdict possible. It is a proper one and one with which I thoroughly agree. I have not the slightest doubt that the minister of justice will take full cognizance of your recommendation and that the death penalty will not be visited upon these two unfortunate men. I will be much mistaken if your verdict does not materially reduce the length of imprisonment."

**Crime as a Profession.** It is somewhat astonishing to find crime rising to the intellectual rank of a profession. But the recent revelations which have been occupying front page space in the newspapers leave little room for skepticism upon the point. The reading public was startled a few weeks ago to learn of the existence of a blackmailing syndicate. The elaborateness of the organization seemed a deliberate challenge to the credulity. And more recently we are learning of auto "syndicates" which are conducted along the principles which govern big business. Eighteen machines were stolen in Chicago a short time ago during the course of a single day. This, doubtless, the heads of the "business" would describe as "efficiency." We may suppose that the men selected to do various jobs are specialists in their particular spheres, and that the whole undertaking is characterized by scientific management. America has taken pride in the intellects which she has developed in the practical spheres of life. Foreigners have complained in the past that commercial pursuits have drawn off our best brain from artistic pursuits. Shall the future find the American intellect best expressing itself in criminal activities?—Minneapolis Tribune.

**Humor Found Everywhere.** Among those pre-eminently gifted with humor were Abraham Lincoln, Disraeli, Goethe and Heine, the late Lord Salisbury, Arthur Balfour, Dickens, Thackeray, Fielding, Shakespeare, Queen Elizabeth, Henry VIII., Charles II., Dr. Johnson, Charles Lamb, Emerson, and Byron. The only persons who lack it altogether are madmen. Criminals, as a whole, are never without it. There is the case of one murderer at the bar in London who, on being asked if there were any reason why sentence of death should not be passed upon him, replied: "No, I am disgusted with the whole proceedings." Another in a similar situation, on being asked whether he had a last request to make, said: "Well, I should like to learn to play the piano."—Sir Herbert Beerbohm Tree.



A Record of Bench and Bar

## *American Institute of Criminal Law and Criminology*

THE ninth annual meeting of the American Institute of Criminal Law and Criminology was held at Town Hall, Saratoga Springs, on September 3d and 4th, 1917.

Three of the largest and most interesting sessions were crowded with excellent reports and discourses on the most important branches of criminal jurisprudence and research.

The annual address of President John P. Briscoe, judge of the court of appeals of Maryland, entitled, "Reforms of the Criminal Law," was a careful study of present conditions and suggestions for the extension of many discussed topics now before some of the legislatures and Congress. He was particularly urgent with regard to the adoption by Congress of the system of suspended sentence and parole as followed in many of the states, but forbidden to be exercised by the Federal judiciary in the recent decision in *Ex parte United States*, 242 U. S. 27, 61 L. ed. 129, 37 Sup. Ct. Rep. 72, Ann. Cas. 1917B, 355. He also suggested renewed interest in the work of the committees studying the problems of public defender, drugs and crimes, and the teaching of criminalistics in our universities and colleges. He advocated taking up the study of the relation of national prohibition to

the commission of crime and the use of Federal prisoners as laborers in our Army and Navy. A careful reorganization of our inferior criminal courts was also suggested, to be considered by a committee to be appointed.

The report of the secretary, Edwin M. Abbott, Esq., of Pennsylvania, showed a slow but steady increase in membership and usefulness of the institute.

Herbert C. Parsons, Esq., of Boston, reported on "Probation and Suspended Sentence." His report is full and comprehensive and proves the efficiency of this modern system of penology now in force in one form or another in forty-seven states, although eighteen of them restrict it to juveniles under sixteen years of age.

Francis Fisher Kane, Esq., of Philadelphia, chairman of the Committee on "Drugs and Crime," delivered the most interesting and unique report of the meeting. He clearly demonstrated the growth of the use of narcotics and the development of a trade in its dispensation. He urged an amendment to the Harrison Act, so that possession of the drugs would constitute a punishable offense as well as the sale of them. At his instance the institute unanimously adopted the resolution and urged Congress to



EDWARD LINDSEY

Vice Presidents of American Institute of Criminal Law and Criminology

so amend the law. He particularly praised the passage of the recent Vare Drug Act by the Pennsylvania legislature, and urged its adoption as a uniform act to be followed in every state. Mr. Kane's report was in part as follows:

"When compared with the liquor evil, the drug problem does not loom large. Its extent is, of course, circumscribed. Probably drug taking among the rich and well-to-do is growing less. Probably, notwithstanding all that has been done to check it, it is increasing in the lower walks of society. And remember, it has no excuse whatever for its existence. There is no such thing as a temperate or moderate use of narcotic drugs; to take them at all except under the doctor's prescription for the alleviation of pain, and then only under certain circumstances, cannot be defended on any social ground. Whoever heard of a person giving himself a hypodermic injection of morphine or heroin for social purposes? We are in no sense interfering with natural tastes or cravings by interdicting the indiscrimi-



JAMES B. REYNOLDS

Vice Presidents of American Institute of Criminal Law and Criminology

nate sale of morphine, heroin, and cocaine. And yet enormous quantities of narcotics are being used illegitimately. Before the war it was estimated that the illegitimate use was probably 80 per cent of the whole. Now, of course, the legitimate demand has been enormously increased, and if the war continues, it will go on increasing. Nevertheless, the illegitimate use is probably out of all proportion to the legitimate. No one contends that the legitimate manufacturers intentionally supply the illegitimate trade. Indeed, it is hardly likely that any morphine is made in this country deliberately to supply the underworld. And yet it gets there all the same. Heroin came, as we know, from Germany, but large quantities of it are now made in this country and sold as medicine for the legitimate needs of the profession. The story of how it came to be used among criminals has been told by an ex-convict, who spent many years in one of our state penitentiaries. He says that whenever he and his fellow prisoners were afflicted with a

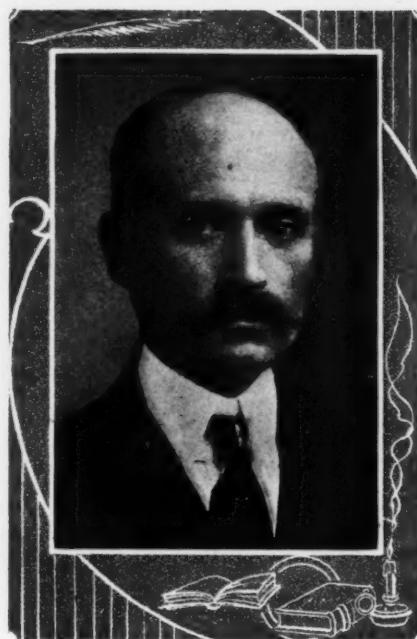


EDWIN M. ABBOTT

Sec'y Am. Inst. Crim. Law and Criminology

cough, they made it an excuse to get some sort of soothing pills from the prison doctor, and that the news soon spread around the prison, and from the prison to the outside world, that there was a new and most agreeable remedy to be obtained under the name of heroin. It was 'good dope.' The news spread from one city to another, and soon afterwards the underworld everywhere was using it. The heroin habit was thus established in our tenderloin when the Harrison Act went into effect, and the drug can still be had in our large cities, at the street corners in the 'tenderloins,' if you only have enough money to pay for it. The poor girl of the streets will tell you it is better than morphine, because it is twice as strong. It does not have the same unpleasant effects upon the digestive apparatus of some people.

"The question recurs, How does this vast supply—because it is a vast supply—of narcotics get into the hands of the illegitimate trade? How does the supply find its way into the hands of the large



FRANCIS F. KANE

U. S. Attorney, Eastern Dist. of Pa.

dealers, who, in turn, pass it over to the peddlers and carriers of our red-light districts? Doubtless, a large part comes from Canada, having been previously exported from this country; some from Mexico; the rest directly from sources in this country. The Harrison Act does not attempt to regulate the exporting and importing of narcotic drugs; it covers solely the trading in such drugs within the country. Consequently, the large dealer can fill an order for a firm in Toronto, and then portions of the order can find their way back into the United States, carried, it may be, in the gripsacks of innocent looking travelers across the Niagara river, returning to their native land from the Dominion. It will be remembered that enough heroin to kill all the inhabitants of a large city can be carried in an ordinary gripsack, and although Pullman parlor car porters, as a class, are fine specimens of their race, and honest too, there are exceptions to the rule, who are willing not to ask embarrassing questions about packages



**DR. THOMAS W. SALMON**  
Medical Director Com. of Mental Hygiene  
placed in their custody when the frontier  
is crossed.

"It has been proposed to extend the provisions of the Harrison Act to foreign commerce, and, better still, to require manufacturers of medicine to put up their goods in comparatively small amounts, and place on each package a serial number which would appear upon the label or the carbon. In this manner the particular drugs seized by the officers of the law in the hands of the drug peddler, let alone a large supply seized in the possession of a dealer, might be traced back to the manufacturer, and through his books and records it would not be difficult to ascertain the various middlemen through whose hands the drugs had passed. It has been argued that the last seller would destroy the label, or that he would at least erase the serial number. This would, in certain cases, undoubtedly be done, but there would be many others where it would not be done, for the illicit vender has always to prove that the pills or powders which



**ARTHUR WOODS**  
Police Commissioner, New York

he sells contain the genuine article. He cannot otherwise get the high prices which he seeks, the user requiring proof that he is buying the drug he asks for. We have known of at least one dope fiend who insisted on proof that the morphine he was buying was the Powers & Weightman article. He was not to be put off with an inferior grade. Consequently, drugs for the illegitimate trade must be kept in their original packages as long as possible, and a provision such as we have suggested, requiring the stamping of serial numbers on all packages, would be of considerable use in checking the illegal traffic.

"One of the worst aspects of the drug evil is that the users that get before our courts are, for the most part, young men and women. Doctors explain this by saying that the mortality in users is very great; ten years is given as the maximum of life for the confirmed cocaine or heroin user. Death does not come directly from the drug, but the taker's system becomes undermined. He falls an easy



**HON. FRANKLIN CHASE HOYT**  
Presiding Justice, Children's Court, New York

prey to tuberculosis or some intestinal or cardiac trouble. Certain it is that the confirmed 'habitué' takes scarcely any nourishment; that he looks as if a puff of wind would blow him over. There are, of course, rare instances where men and women take morphine and grow old. Such cases, however, are not cases of drug dissipation, as such, where the amounts taken and the frequency of the dose are such as to render normal life impossible. Another very serious aspect of the matter is that most of the habitués that are before our courts are persons of American birth. Why this is so we do not know, but the fact is not a pleasant one to contemplate. Over a year ago it was found that in Philadelphia cocaine was being sold to the children of one of our public schools. This will give you an idea of the evil.

"Drug taking in our large cities has become to an alarming extent the concomitant of ordinary dissipation. A criminal lawyer of wide experience recently called attention to this fact. When he was a



**HERMAN M. ADLER**  
State Criminologist, Illinois

boy it was unknown, and the corner loafer who drifted into vice knew nothing in the way of stimulants besides those of alcoholic origin. . . . Already in our big cities there have been shocking cases of drug poisoning reported in the newspapers, and which have called for the most stringent exertions on the part of the authorities.

"What is the remedy? Punish the dealer as severely as you can, but how about the user? To lock up the confirmed user for a short period of time does him no good whatever, for while it takes but a few days to get the drug out of the system, the man will return to the drug again as soon as he can get it. Nothing short of a year's separation from most narcotics will break up the habit. The man or woman must be cut off from the old surroundings, removed from the temptations to which he or she succumbed, and this separation must be maintained for a long period of time, under strict discipline at first, and then the discipline must be gradually relaxed, not

taken away suddenly. Occupation meanwhile is a prime necessity. The mind and body must have something to work upon. Idleness is not the alternative required. This is the thought, of course, back of the so-called inebriate farms that have been started in one or two of our states. Drug takers, as well as alcoholics, should be put on farms and kept there long periods of time, and not allowed to go back to the 'tenderloins' from which they came."

Thomas Mott Osborne, former warden of Sing Sing prison, and now warden of the Naval prison at Portsmouth, New Hampshire, spoke on "Common Sense in Prison Management." He attacked the system of punishments followed in many quarters and suggested many reforms, particularly the honor system. He illustrated his talk with personal anecdotes from experiences with rejuvenated prisoners who are now highly respected and useful citizens in the communities in which they live.

The report of Miss Kate Claghorn, of New York, on "Crime and Immigration," was an exhaustive study of conditions of 231 immigrants examined and classified. It was but a preliminary report, to be followed by a closer examination into the details for future legislation.

Among the conclusions she drew from her investigations were these: "The native-born seems to have a greater tendency to come into conflict with the law than do the foreign born, and they show a much higher percentage of recidivism than the foreigner.

"Immigrants showing a higher level of intelligence likewise show a predominant tendency to crimes of an acquisitive nature, while those whose intelligence is lower were most frequently guilty of crimes against the person and sex crimes."

Dr. William A. White, of Washington, District of Columbia, reported for the Committee on Sterilization of Criminals. This question, he said, has been so greatly opposed and found to be so unsatisfactory of solution that the committee requested their discharge. They were unable to agree on what should be advocated, for the states where laws authorizing sterilization had been enacted, they were

not enforced or had been declared unconstitutional by the courts as being "cruel and unusual punishment." The institute thereupon voted to discharge the committee from further consideration of the subject.

Judge Harry V. Osborne, of Newark, New Jersey, chairman of the Committee on State Societies and Membership, recommended a new system for future activities.

A large committee of three members for each state is now provided to report to a small central committee, who will extend the usefulness of the institute throughout the United States.

Resolutions pledging loyalty to the President of the United States during the continuation of the war, and urging at its conclusion the establishment of a League of Nations "to secure an enduring peace," were passed.

The following officers were then elected for 1917-18.

President, George W. Kirchwey, New York, Dean of Columbia University Law School.

Vice Presidents, James Bronson Reynolds, New York; Edward Lindsey, Warren, Pennsylvania.

Secretary, Edwin M. Abbott, Philadelphia.

Treasurer, Bronson Winthrop, New York.

Executive Committee (to serve to 1920) Franklin Chase Hoyt, chief justice of the children's court, New York city; Arthur Woods, police commissioner of New York city; Dr. Thomas W. Salmon, medical director of Committee of Mental Hygiene, New York; Herman M. Adler, State Criminologist, Chicago, Illinois.

President Kirchwey then pledged the institute to greater activities in the future, and the meeting adjourned.

Edwin M. Abbott,  
Secretary.

#### Death of Judge Dudley.

JUDGE CHARLES ASHMAN DUDLEY of the Iowa district court died in Des Moines on October 18. He was born in Freedom, Portage county, Ohio, November 14, 1839. He sprang from old

New England stock, and his father, Charles Dudley, was a direct descendant of Governor Dudley of Massachusetts. His mother was a descendant of Governor Letts of Connecticut.

He matriculated at the University of Michigan in 1861 and graduated four years later. The honorary degree of LL. B. was conferred upon him by Drake university in 1904 and two years later Michigan university conferred the A. M. degree.

He had been prominently identified with Polk county jurisprudence since 1867, when he came to Des Moines and began the practice of law subsequent to his graduation from the University of Michigan.

Upon launching his legal career in Des Moines, Judge Dudley became junior member of the firm of Brown & Dudley, which established offices in the old Clapp building.

Some time later he joined forces with Judge Mitchell. The legal firm of Mitchell and Dudley resulted. In 1897, N. E. Coffin became his partner and the firm became Dudley and Coffin. The partnership was dissolved when the judge was appointed to the district court bench in 1912.

During the greater part of his career on the bench, Judge Dudley presided over the juvenile branch of the district court. He also acted as law instructor at Drake university.

#### Chicago Lawyer Aids Military Football Contest.

The Camp Grant and Camp Custer National Army teams will undertake to stage even a more brilliant football contest and military display than rival universities when teams from the Rockford and Battle Creek cantonments meet on Stagg Field Saturday, December 1.

Emil C. Wetten, veteran executive of many patriotic projects, accepted an invitation to serve as vice chairman in active charge of civilian arrangements. He has turned over his law offices in the Temple Building as working headquarters of the civilian committee.

#### Judge Lobingier Guest of Bar Association.

The Bar Association of San Francisco extended a welcome to Judge Charles Sumner Lobingier, of the United States Court for China, at a luncheon recently. Assisting in the welcome to the distinguished jurist was the China Commerce Club, the Chinese Consul General being also present.

President Jeremiah F. Sullivan presided and Frank P. Deering extended the formal welcome to Judge Lobingier on behalf of the Association; and Louis Getz, president of the China Commerce Club, responded for that organization.

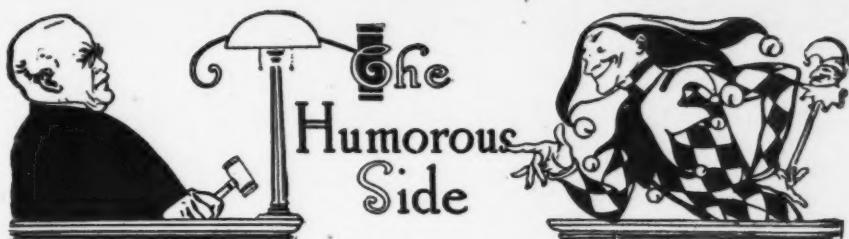
Judge Lobingier confined his remarks to a description of the United States Court for China, its origin, jurisdiction, and jurisprudence. He said in part:

"There are many reasons why our colony in China and the bar of my court and the bar of San Francisco should be in close communication. The judicial circuit of which the United States Court for China is a part is more extensive than any other, and the Circuit Court of Appeal, to which all appeals and writs of error are taken, is located at San Francisco.

"The establishment of a system of jurisprudence was the greatest obstacle that the court had to meet. By the acts of 1848 and 1860, the "laws of the United States" were extended over American citizens in China so far as suitable and necessary to enforce treaties. The question as to what are "the laws of the United States" was a serious one, but it was finally decided by the United States Circuit of Appeal, the late Judge De Haven writing the opinion, that the expression "laws of the United States" means Acts of Congress enacted for jurisdiction such as Alaska and the District of Columbia.

"Under this decision the criminal code of Alaska became available and applicable to China; the District of Columbia code was also used and where the same question was legislated on in both codes, the court has followed the latest expression of the legislative will.

"It does not seem probable that Congress will provide a special code for China."



I am persuaded that every time a man smiles—but much more so when he laughs—it adds something to this fragment of life.—Sterne.

**He'd Fix 'Em.** An attorney who was a daily passenger on a remote western railroad had a row with the conductor one morning. When the row was over the passenger turned to a friend and in an audible tone remarked: "Well, this road will never see another cent of my money after to-day."

The conductor, who was collecting tickets across the aisle, glanced over and snarled: "What'll you do? Walk?"

"Oh, no," replied the attorney, pleasantly. "I'll stop buying tickets and pay my fare to you."—Saturday Post.

**Missed Their Calling.** The fact that Sir Douglas Haig attained his fifty-sixth birthday on June 19th brings back to mind a story told of him a short while back.

It is, of course, well known that Sir Douglas is a soldier first, last, and all the time, regarding all other professions as of quite negligible importance, a trait in his character which lends point to the anecdote.

He was, it appears, inspecting a cavalry troop, and was particularly struck with the neat way in which repairs had been made on some of the saddles.

"Very good work," he remarked to the troop sergeant major. "Who did it?"

"Two of my troopers, sir," was the reply.

"You're fortunate to have two such expert saddlers in your troop," said Haig.

"As a matter of fact, sir," was the reply, "they're not saddlers, in civil life being lawyers."

"Well," ejaculated Sir Douglas, "how men who can do work like that could

have wasted their lives over law I can't imagine!"—Minneapolis Tribune.

**Don't Go on Record.** The face of the young man was rueful, and the lawyer he was interviewing looked exceedingly grave. It was a clear case of breach of promise, and the man of law could see nothing but heavy damages as the ultimate outcome. And he read the riot act to some purpose to the young man, who waxed restive.

"Oh, yes," he said, impatiently, "I know all about it. The same old song, 'Do right and fear nothing.'"

"No, no; that's not it at all," said the old lawyer, smiling shrewdly. "What I meant to impress on you was, 'Don't write, and fear nothing.'"—Rochester Evening Times.

**Proud and Haughty.** On my way to prison (writes a correspondent) for the purpose of visiting a conscientious objector I was joined by another woman. We began to exchange confidences. In reply to a question, I said, "I'm going to see a conscientious objector."

Her nose turned up with ineffable scorn, and she said:

"A conscientious objector? Thank God, my man's not one of them things!" and then she added, proudly, "He's in for forgery."—Manchester Guardian.

**Exception to Rule.** "Two wrongs don't make a right."

"I'm not sure about that," mused Mr. Chuggins. "If I travel faster than the law allows and a motor cop travels fast enough to overtake me, it's perfectly right for him to arrest me."—Washington Star.

**In Bulk.** The lawyer deals in brains and disposes of them by the case.—Winnipeg Telegram.

**An Accommodating Judge.** County justice: Ten dollars.

Motorist: I've only a twenty. Can you change it?

Justice: No, but I can change the fine. I'll make it twenty.—Philadelphia Bulletin.

**Judicial Qualifications.** Earnest youth: Father, what qualifications do you need to be a member of the Supreme Court?

Father: You have to be thoroughly respectable, honorable beyond reproach, and be able to write English in such a way that no other lawyer will be quite sure what you mean.—Life.

**Cruel and Unusual Fun.** A burly man arose in a train that was passing into Kansas from Kansas City, Missouri. "Gentlemen," he proclaimed, "I am a sheriff. Please put all your grips out in the aisle so that I can search them." Visions of a jail sentence for having liquor in his possession flashed through the mind of a passenger halfway down the car. Convulsively he threw his grip out of the window, and sat back, a nervous and thirsty man. When he found that the "sheriff" was only a traveling salesman having fun with evaders of the bone-dry law, his nervousness grew upon him and his thirst became a thirst for blood.

**She Lays Down Law.** Yeast: "You say your wife went to college before you married her?"

Crimsonbeak: "Yes, she did."

"And she thought of taking up law?"

"Yes; but now she's satisfied to lay it down."—Minneapolis Journal.

**Pursued a Policeman.** "They tell me you have been arrested for speeding."

"Yes," replied Mr. Chuggins. "And it was due to my kindness of heart. I tried to overtake a man on a motorcycle to warn him that he was violating the law."—Nebraska Legal News.

**She Paid the Paint Bill.** In Chicago a short time ago a woman was haled into court, charged with intoxication. She was fined \$10, and as she arose, she said to the judge, whom she had heard had just completed a new house in a suburb, "Well, I suppose you need these \$10 to help paint your house."

"Oh, yes," said his Honor, genially. "And I think you'd better give me \$5 more, and I guess I'll paint the blinds."

**Hoping for a Refund.** "Ah notice yo' been goin' to dat postoffice pow'rful reg'lar ob late, Mistah Johnson. Who am yo' correspondin' wif, some female?" questioned a chocolate-colored miss.

"No, ah ain't. But since ah been a-readin' in de papahs 'bout dese conscience funds ah kinda thought ah might possibly git a lettah from dat ministah what married me," returned Sam.—Harper's Magazine.

**The Only Way.** "The Carnegie Foundation's recent resolution to the effect that the only way to insure a permanent world peace is to crush Germany," said Captain W. E. Dame of the Rough Riders in his New York office, "reminds me of the stocky, well-dressed chap in the police station.

"A big burly drunk had been brought in on a stretcher, and the sergeant said to the stocky chap rather sternly: 'What have you got to say for yourself?'

"'Sergeant,' said the stocky chap, 'I have merely been acting the part of a peacemaker.'

"'But good gracious,' said the sergeant, 'you broke six of the man's ribs.'

"'It was the only way,' said the stocky chap, 'to get peace.'"—Washington Star.



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